IN THE SUPREME COURT OF THE
STATE OF OREGON

In the Matter of R. D. D.-G.,
a Child.

DEPARTMENT OF HUMAN SERVICES,
Respondent on Review,

v.

T. M. D.,
Petitioner on Review.

(CC 16JU02919) (CA A163883) (SC S066066)

On appeal from the Court of Appeals.*

Argued and submitted January 18, 2019.

Tiffany Keast, Deputy Public Defender, Office of Public Defense Services, Salem, argued the cause and filed the briefs for petitioner on review. Also on the briefs was Shannon Storey, Chief Defender, Juvenile Appellate Section.

Cecil A. Reniche-Smith, Assistant Attorney General, Salem, argued the cause and filed the brief for respondent on review. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Walters, Chief Justice, and Balmer, Nakamoto, Flynn, Duncan, and Nelson, Justices, and Linder, Senior Justice pro tempore.**

WALTERS, C. J.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

Balmer, J., concurred and filed an opinion.

---

* On appeal from Josephine County Circuit Court, Michael Newman, Judge. 292 Or App 119, 423 P3d 88 (2018).

** Garrett, J., did not participate in the consideration or decision of this case.

WALTERS, C. J.

In this proceeding to terminate mother's parental rights, the juvenile court determined that mother was unfit and that it was improbable that child could be returned to mother's care within a reasonable period of time, satisfying the requirements of ORS 419B.504. However, the court determined, the Department of Human Services (department) had not established, as ORS 419B.500 requires, that termination of mother's parental rights was in child's best interest. The court acknowledged that the department had proved that child had a need for permanency that could be met by terminating mother's parental rights and permitting child's foster parents, his maternal uncle and aunt, to adopt him. However, the court also found that child had an interest in maintaining his bond with his mother and her parents. The court suggested that child's need for permanency could be satisfied by permitting his foster parents to serve as his permanent guardians and concluded that it was not in his best interest to terminate mother's rights. Accordingly, the court dismissed the petition. The department appealed, and, as directed by ORS 19.415(3)(a),[1] the Court of Appeals reviewed the record *de novo*. *Dept. of Human Services v. T. M. D.*, 292 Or App 119, 121, 423 P3d 88 (2018).

Although the Court of Appeals relied on the same facts as did the juvenile court, it reached a contrary conclusion from those facts. In an *en banc*, split decision, the Court of Appeals determined that child's pressing need for permanency could be satisfied in relatively short order if he were "freed for adoption" and that, although naming child's foster parents as his guardians might mitigate the effects of past disruptions, "leaving open the possibility of a return to mother creates its own instability" and was a "less-permanent" option that was not in child's best interest. *T. M. D.*, 292 Or App at 138.

---

[1] ORS 19.415(3)(a) provides:

"(3) Upon an appeal in an equitable action or proceeding, review by the Court of Appeals shall be as follows:

"(a) Upon an appeal from a judgment in a proceeding for the termination of parental rights, the Court of Appeals shall try the cause anew upon the record[.]"

As the division in the Court of Appeals indicates, this is a close case. But, on *de novo* review in this court,[2] we conclude that child has both a need for permanency and an interest in maintaining his maternal family relationships. Although we do not adopt the reasoning of the juvenile court in its entirety, we agree with its conclusion that, given the particular facts presented here, it is in child's best interest that his mother's parental rights not be terminated. We therefore reverse the decision of the Court of Appeals and affirm the judgment of the juvenile court.

FACTS AND PROCEDURAL BACKGROUND

We take the facts from the record before the trial court and that court's findings. *See State ex rel Dept. of Human Services v. Smith*, 338 Or 58, 62, 106 P3d 627 (2005) (finding facts based on *de novo* review of the record). Our recitation of the facts is consistent with that recounted by the Court of Appeals. *See T. M. D.*, 292 Or App at 122-130 (discussing facts in record). Child was born in June 2012. In September 2014, the department filed a petition in the juvenile court asking the court to assert jurisdiction over child. The juvenile court did so in November 2014 after determining that (1) mother's substance abuse interferes with her ability to safely parent child; (2) mother failed to maintain a safe environment for child, given the fact that controlled substances and drug paraphernalia were found within child's reach; and (3) mother exposed child to persons who possessed drugs and engaged in criminal activities, such as father.[3] The court placed child in foster care with his maternal uncle and aunt and ordered mother to participate in various services, including a psychological and substance abuse evaluation.

---

[2] ORS 19.415(4) provides:

> "(4) When the Court of Appeals has tried a cause anew upon the record or has made one or more factual findings anew upon the record, the Supreme Court may limit its review of the decision of the Court of Appeals to questions of law."

Although that statute permits us to limit our review to questions of law, we decline to do so here.

[3] The juvenile court also found jurisdiction as to father for the same reasons, and, at the termination hearing that is the subject of this appeal, father relinquished his parental rights. Father is not a party to this appeal.

Not until almost one year later, in August 2015, did mother, then age 24, undergo the required substance abuse assessment. At that time, she disclosed that she had been using heroin since age 13 and that her heaviest use had been during the preceding year and a half, in an attempt to relieve pain she suffered due to degenerative disc disease, scoliosis of the spine, and other medical issues. Mother admitted that she may have used heroin three days before the assessment but stated that she was currently engaged in a 12-step program through her church and previously had completed a treatment program. The counselor who performed mother's assessment found that mother was in the "preparation" stage of change, in which she acknowledged the need to change her drug-related behavior, and was beginning to undertake that change.

Prior to mother's permanency hearing, scheduled for February 2016, however, she had not submitted all required urine samples and had tested positive for controlled substances, including marijuana, heroin, and prescription opiates. Two weeks before the hearing, she was arrested for possession of heroin, and she would later be convicted of that charge, marking her second conviction for heroin possession in a little more than a year.

At the February 2016 permanency hearing, mother asked for more time to finish her services, but the juvenile court rejected her request. The court highlighted mother's substance abuse issues,[4] noting that she had been indicted for theft and heroin possession, and also explained that she had missed many scheduled visits with child. The juvenile court found it particularly significant that mother continued to let father live in her home, even though she had been ordered to not knowingly associate with persons using or possessing controlled substances illegally, and that she had not

[4] The information that the juvenile court considered in that regard included testimony from Dr. Morrell about the cause of mother's drug abuse. The court noted that Morrell had diagnosed mother with Somatic Symptom Disorder, which had resulted in mother's "well intended but misguided attempt" to regard her emotional disturbances as medical rather than as psychological problems, making it difficult for her to "get past" them. Morrell testified that post-traumatic stress disorder is frequently a precursor for Somatic Symptom Disorder and that mother had that precursor from "pretty significant sexual abuse for several years as a child."

allowed the department into her home to inspect it. The juvenile court acknowledged mother's successes—which included completing some of her treatment, engaging in services, and improving her attendance at scheduled visits with child—and it "commend[ed] Mother on the efforts that she has made in this case." Notwithstanding those successes, however, the juvenile court determined that a change in child's plan was warranted. The court found that mother had not made enough progress toward meeting the previous orders of the juvenile court and that child could not safely be returned to either parent's care. The juvenile court further observed that child had been in substitute care "for 17 months, a good portion of his life," and that best practices required that child be given permanency. The juvenile court changed child's plan from reunification to adoption and ordered that a petition to terminate parental rights be filed. Yet, the court "emphasize[d]" that the case was "not over" and noted that the department would continue to work with mother.

In accordance with the court's order, the department filed a petition to terminate mother's parental rights, alleging grounds for termination under ORS 419B.504 and 419B.500. The department alleged that (1) mother was "unfit by reason of conduct or condition seriously detrimental" to child; (2) integration of child into the home of mother "is improbable within a reasonable time due to conduct or conditions not likely to change"; and (3) termination was in child's best interest.

In preparation for the termination hearing, child underwent a psychological assessment with Dr. MacPhail, who recorded her findings in a report introduced as evidence at the termination hearing. In that report, MacPhail explained that she had diagnosed child with language disorder and adjustment disorder with mixed disturbance of emotions and conduct. Symptoms of the latter, she wrote, "likely [are] at least in part related to the numerous changes and stressors in [child's] life and are affecting his overall social-emotional functioning." MacPhail further stated that permanency was child's greatest need. She reported that child had experienced a great deal of disruption in his life and would benefit from "regular routines" and "secure attachments." MacPhail recommended that a permanent

placement be secured as soon as possible, as child appeared to be forming a positive bond with his current foster parents and the transition to their care would be "relatively smooth" if he were placed with them permanently. Should child be placed with another caregiver, MacPhail explained, that transition could be experienced as a loss.

MacPhail reiterated her findings and opinions at the termination hearing. She testified that having child wait in foster care another year, for example, until mother was fit to parent and then removing him from his foster parents would be "more distressing," and that remaining in "this state of limbo" can cause anxiety in itself, as "the child doesn't know with whom they're going to live." When the department asked whether adoption was the best plan for child, MacPhail stated that she could not answer that question. She could say only that "he does need to be in a permanent living situation" and that "being unsure of who the caregiver is" can "cause more distress for him." MacPhail testified that it was not in her "purview" to make a recommendation about guardianship or open adoption; she could say that, if child were not going to be returned to his biological parents but were to have ongoing contact with them, "it would need to be with the assurance that his parents would be able to provide him with the ability to meet his needs and to be supportive of him." MacPhail also agreed, however, that "it is a benefit to a child to have not only his or her caregivers, but loving active involvement by grandparents, aunts, uncles [and] cousins."

Child's caseworker, Blackwood, also testified at the termination hearing. She explained that mother and child's interaction since the time of the permanency hearing had been positive. Mother's attendance was very good, and she had missed only three of the 19 scheduled visits. Blackwood further testified that mother is "loving and affectionate" with child, playing with him during their one-hour visits. Blackwood testified that child was very comfortable with his foster parents and was engaging in activities, including going to his grandparents' home and the library. Child was improving in gross motor skills, adaptive skills, social skills, cognitive abilities, and communication. The foster parents, Blackwood testified, noted that child took probably a day

and a half after visitations to get "where he has less fits and is not quite as whiney," but that he "is developing."

Blackwood observed that child is adoptable and that both his foster parents (his maternal uncle and aunt) and his grandparents (mother's parents) were willing to adopt child. In response to a question from the department, Blackwood agreed that adoption, as opposed to another plan, is what child needs, because,

> "[w]ith an adoption, it's permanent. He will know where he lives. He won't have to question where he will go to bed at night, who will take him to the school or to any activities. He will have that permanency knowledge. But when we're looking at both relatives, they can maintain contact with the parent."

Blackwood did not view guardianship as equally appropriate because, in her view, "there is a possibility a parent could come back and disrupt that [placement] in the near future or long future and it's not as concrete and permanent as an adoption could be." Blackwood testified that a guardianship was not in child's best interest because he is young, he is adoptable, and "[w]e need to look at the most permanent plan possible for him." Blackwood explained that child "needs permanency" and that his foster parents could satisfy that need: they had cared for him for at least half his life, and he "easily goes to them for affection, for comfort, for validation, for security."

Blackwood concluded by explaining that child's transition to a permanent caretaker needs to happen as soon as possible because child needs it "for his own growth and development." When asked to explain why she viewed adoption, instead of another option, as the only way to meet child's need for permanency, Blackwood answered that statutes "indicate that we need to go for the most permanent plan" available and that "when we can't rule out adoption, we need to go for it."

The juvenile court considered the above-outlined evidence, along with other evidence presented at the termination and permanency hearings, including testimony from mother and child's maternal grandparents, in issuing its written opinion. The juvenile court first determined that the

department had established grounds for termination under ORS 419B.504—that mother was unfit and that reintegration within a reasonable period of time was not probable. The juvenile court then considered whether the department had established that it was in child's best interest to be freed for adoption, a necessary finding under ORS 419B.500.

In reaching its best-interest determination, the juvenile court began by briefly discussing two Court of Appeals decisions, one in which the Court of Appeals had determined it was in a child's best interest not to be freed for adoption given the child's bond with his mother, *see Dept. of Human Services v. M. P.-P.*, 272 Or App 502, 504, 356 P3d 1135 (2015), and another in which the court had determined that a child should be freed for adoption given the child's need for permanency and desire to live permanently with the proposed adoptive parents (the child's grandparents), *see Dept. of Human Services v. K. M. M.*, 260 Or App 34, 48, 316 P3d 379 (2013), *rev den*, 354 Or 837 (2014). The juvenile court then addressed the circumstances of this case, beginning with evidence from MacPhail bearing on child's psychological development and well-being:

> "[MacPhail] noted that child has below average social skills and his verbal development is only in the second percentile. She diagnosed him with adjustment disorder with mixed disturbance of emotions and conduct as well as a language disorder. She explained that these are likely the product of neglect and can be overcome with behavioral and language therapy. She testified that Child has a higher level of need than the average child, so permanency is especially urgent. In her opinion, asking Child to wait while Mother completes six months of inpatient treatment followed by six months of settling into a residence and getting stable is too long. Dr. MacPhail acknowledged that Child's behavior and development issues could be genetic in origin, but she discounted the likelihood of this because Child is improving in foster care. She did not favor adoption specifically as being in Child's best interest. Instead, her focus was on early permanency in any form—open adoption or guardianship could very well be appropriate."

From there, the juvenile court discussed the evidence about child's relationship with mother and mother's relatives:

> "Mother and Child do have a bond, despite the limited time they have together and despite the fact that Child has lived with his uncle and aunt for half of his four years. Maternal grandmother *** has been able to see Child as part of Mother's visits. [Grandmother] observed that Child is excited to see Mother, and the two of them play together, color, talk, read books. She sees that Child has trouble separating from Mother at the end of the visit. [Grandmother] and her husband *** also have a close bond with Child. [Grandmother] testified to an ongoing close relationship between the grandparents and Child prior to Child being placed with his uncle and aunt. They had spent much time together, including visits to the library and to the YMCA. [Grandmother] testified that the grandparents, Mother, and the uncle and aunt ([Grandmother] is uncle's mother) are all working together for Child. [Grandmother] explained that family is very important to them and that a family does not give up. [Grandfather] also testified to the close relationship. At the September hearing he submitted into evidence several photos taken at five or six family gatherings occurring earlier this year. He noted that Child typically takes a position next to Mother and they hold hands. He said that Child does this spontaneously."[5]

The court noted mother's testimony that she had been "seeing Child more regularly and is able to apply parenting lessons that she has learned." The court further explained that mother, if "successful in treating her pain with herbal extracts and medical marijuana, *** may be able to focus on being a parent." The court acknowledged that mother's "prognosis is poor, given Dr. Morrell's evaluation" and that that is aggravated by the fact that mother "still loves Father and cannot 'throw his stuff out on the street.'" However, the court agreed with mother that termination "is for hopeless cases." The court reasoned that "it does appear that [child] has a good albeit very limited

---

[5] The juvenile court noted that grandmother is skeptical of the department and makes excuses for mother. In doing so, the court stated:

> "[Grandmother] may well be working against Mother's interest by supporting her denial of problems that need to be addressed. This suspicion and distrust of [the department], however, does not mean that the family relationship should be ignored. [Grandmother] may or may not be an appropriate permanent placement for Child due to her counterproductive support of Mother, but the issue here is whether it is in Child's best interest to sever the parental relationship altogether."

relationship with Mother" and that it is in "Child's best interest to maintain the family relationships." Doing so, the court stated, "may be an incentive to Mother." Accordingly, the court determined that it was not in child's best interest to sever mother's parental rights, and it suggested that child's need for permanency could be satisfied by a permanent guardianship.

The department appealed the juvenile court's judgment, taking issue with the juvenile court's determination that severing mother's parental rights was not in child's best interest. In the department's view, once the juvenile court determined that the two requirements of ORS 419B.504 were met—*i.e.*, (1) mother was unfit, and (2) it was improbable that child could be integrated into her home within a reasonable time—the requirement of ORS 419B.500 should be presumed—that termination is in child's best interest. Mother disagreed, arguing that such a presumption is not supported by law and would impermissibly shift the burden of proof on an element of the department's case to mother.

On *de novo* review, the Court of Appeals issued a divided decision. Writing for the court, the majority declined to address the department's presumption argument because it determined that the record "contains clear and convincing evidence that it is in child's best interests to terminate mother's parental rights." *T. M. D.*, 292 Or App at 131. The court was persuaded that termination was warranted because child's "pressing need for permanency and the harm that appears likely if permanency is further delayed" calls for child "to be freed for adoption now, rather than waiting indefinitely to see whether mother can eventually become a safe parent for child." *Id.* at 131-32.

In reaching that conclusion, the court stated that "the juvenile court's approach, however well intended, is not appropriately child centered." *Id.* at 134. The court began its discussion by noting how "the exact circumstances that endangered child's welfare and so brought child under the jurisdiction of the juvenile court in November 2014 remained essentially unchanged at the time of the termination trial nearly two years later." *Id.* at 132. The court explained that, despite mother's involvement and participation in the court-ordered services during that time, "she had made

no meaningful progress toward ameliorating the bases for the juvenile court's involvement." *Id.* The court understood the juvenile court's "desire to give mother an incentive to succeed" by not severing her parental rights; yet, the court stated, a belief that that incentive would be effective was counter to "virtually all of the evidence" admitted at trial. *Id.* at 133.

In the court's view, notwithstanding the juvenile court's "passing references to child, it is evident that the court's focus was on mother and its desire to see her succeed, rather than the effects that delaying permanency would have on him." *Id.* at 134-35. Based mostly on the testimony and report of MacPhail, the court then determined that termination was in child's best interest. The court noted MacPhail's opinion that stability, permanency, and consistent care-giving are child's greatest needs and reasoned that child had been improving under the care of his uncle and aunt and that the transition to their care was "already well underway." *Id.* at 135-36.

Yet, the court determined, a permanent guardianship with child's foster parents was not an adequate means to establish the permanency that child needs. *Id.* at 136. According to the majority, the juvenile court had considered the permanent guardianship as a potentially temporary arrangement that would be inadequate to address MacPhail's concerns:

> "[M]any of the concerns that MacPhail expressed would not be alleviated by making child's foster parents his guardians. That is, the various concerns regarding the stress of uncertainty and the consequences of delaying child's attachment to his permanent caregiver would still be present, but the delay would be in the transition back to mother, rather than to his guardians. MacPhail opined that, in the approximately two years that child had been in the care of his uncle and aunt, he had 'developed a very secure bond, particularly with his [uncle].' MacPhail explained that once that happens, a subsequent move to another caregiver can be extremely disruptive and stressful, and that the child's reaction to being separated from the foster parent can be quite traumatic. We recognize that there is likely some risk of that phenomenon occurring every time that a child rejoins his or her parents following a temporary placement;

> the question here, however, is whether, given child's already lengthy removal from his mother's care—together with the likelihood of an equal amount of future delay—it is in his best interests to leave open the possibility of a return to mother. We conclude that it is not."

Id. at 137 (internal footnote omitted).

Finally, the court reasoned, "the juvenile code expresses a legislative preference that children be placed in the most permanent setting suitable to their needs." *Id.* at 138. Accordingly, the court concluded that a permanent guardianship, although providing "some degree of permanency to child and potentially address[ing] a number of the concerns raised by MacPhail and others, *** is not the most permanent placement suitable to child's circumstances." *Id.* at 138. The most permanent placement "suitable to child," the court said, was adoption by child's foster parents. *Id.* Placement with them, the court explained, "would alleviate *all* of the uncertainties attendant to any temporary placement, no matter how durable that placement may appear." *Id.* (emphasis in original).

Judge Ortega authored the dissent, and four other judges joined her. The dissent was not persuaded by the majority's assertion that it was not applying a presumption in favor of adoption; in the dissent's view, the majority had effectively done so by "concentrating its analysis entirely on the evidence that established mother's unfitness *** and in assuming that termination of mother's parental rights was the only way to address child's need for permanency." *Id.* at 144. The dissent recognized that mother is "not able to serve as a custodial resource," but, for the dissent, that did not mean that termination was necessary: "mother and child have a positive attachment," and "child is in a stable placement with his uncle and aunt." *Id.* Establishing a permanent guardianship with those foster parents, the dissent explained, citing ORS 419B.365 and ORS 419B.368(7), "would accomplish permanency that cannot be disrupted by mother." *Id.* at 145. The dissent would have affirmed the judgment of the juvenile court. *Id.*

Mother filed a petition for review in this court, which we allowed. In this court, the parties do not square

off, as they did in the Court of Appeals, about whether there is a statutory presumption that the rights of an unfit parent must be terminated when reunification within a reasonable time is not probable. Mother disputes the existence of such a presumption, but the department does not engage. Instead, the department argues that there is a legislative "preference" for adoption in that circumstance. That preference, the department contends, may not be dispositive, but it must be a significant factor in a juvenile court's determination of a child's best interest. The department argues that, when there is evidence that the termination of parental rights could have a potentially harmful effect on a child, a juvenile court may decide that termination is not in a child's best interest; but, in the absence of such evidence, the preference for adoption requires termination. Mother responds that the text of the relevant statutes does not provide either a presumption or a preference for termination; she contends that the juvenile court was correct in its conclusion that the department did not establish, by clear and convincing evidence,[6] that termination of her parental rights was in child's best interest. Child's best interest is served, mother contends, if his maternal uncle and aunt become his permanent guardians, providing him with permanency and maintaining his familial bonds.

ANALYSIS

The first question we must analyze is whether the statutory scheme contains a presumption or a preference for termination when a parent has been found to be unfit under ORS 419B.504. In analyzing that question, we begin with the relevant text. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (stating methodology).

The statutory grounds for termination of parental rights are set out in ORS 419B.502 to 419B.524. ORS 419B.504, the statute on which DHS relies for termination in this case, provides that

[6] Both the juvenile court and the Court of Appeals stated their conclusions about child's best interest in terms of whether the department had proved that termination was in child's best interest by "clear and convincing" evidence. *See* ORS 419B.521(1) (facts on which termination is based must be established by clear and convincing evidence). In this court, neither party argues that that standard of proof is determinative.

> "[t]he rights of the parent or parents may be terminated as provided in ORS 419B.500 if the court finds that the parent or parents are unfit by reason of conduct or condition seriously detrimental to the child or ward and integration of the child or ward into the home of the parent or parents is improbable within a reasonable time due to conduct or conditions not likely to change."[7]

ORS 419B.500, which is the focus of this case, includes an additional "best interest" requirement. It provides that,

> "[t]he parental rights of the parents of a ward may be terminated as provided in this section and ORS 419B.502 to 419B.524, only upon a petition filed by the state or the ward for the purpose of freeing the ward for adoption if the court finds it is in the best interest of the ward."[8]

---

[7] ORS 419B.504 provides in full:

"The rights of the parent or parents may be terminated as provided in ORS 419B.500 if the court finds that the parent or parents are unfit by reason of conduct or condition seriously detrimental to the child or ward and integration of the child or ward into the home of the parent or parents is improbable within a reasonable time due to conduct or conditions not likely to change. In determining such conduct and conditions, the court shall consider but is not limited to the following:

"(1) Emotional illness, mental illness or mental retardation of the parent of such nature and duration as to render the parent incapable of providing proper care for the child or ward for extended periods of time.

"(2) Conduct toward any child of an abusive, cruel or sexual nature.

"(3) Addictive or habitual use of intoxicating liquors, cannabis or controlled substances to the extent that parental ability has been substantially impaired.

"(4) Physical neglect of the child or ward.

"(5) Lack of effort of the parent to adjust the circumstances of the parent, conduct, or conditions to make it possible for the child or ward to safely return home within a reasonable time or failure of the parent to effect a lasting adjustment after reasonable efforts by available social agencies for such extended duration of time that it appears reasonable that no lasting adjustment can be effected.

"(6) Criminal conduct that impairs the parent's ability to provide adequate care for the child or ward."

[8] ORS 419B.500 provides in full:

"The parental rights of the parents of a ward may be terminated as provided in this section and ORS 419B.502 to 419B.524, only upon a petition filed by the state or the ward for the purpose of freeing the ward for adoption if the court finds it is in the best interest of the ward. If an Indian child is involved, the termination of parental rights must be in compliance with the Indian Child Welfare Act. The rights of one parent may be terminated without affecting the rights of the other parent."

ORS 419.500 thus "contemplates a two-stage analysis":

> "The first stage focuses on the conduct of a parent, *i.e.*, the alleged statutory grounds for termination. The second stage focuses on whether the best interests of the child will be served by termination. In a termination proceeding, if a parent's conduct justifies termination, then the best interests of the child are considered explicitly, and could even then prevent termination from occurring."

State ex rel Juv. Dept. v. Beasley, 314 Or 444, 451-52, 840 P2d 78 (1992);[9] *see also State ex rel Juv. Dept. v. Geist*, 310 Or 176, 189, 796 P2d 1193 (1990) (issue in termination case is whether "the statutory grounds for termination have been established by clear and convincing evidence, and, if so, whether the child's best interest will be served by termination of the parent-child relationship" (citation omitted)).

That two-stage inquiry suggests that the legislature did not intend that establishing unfitness—a parent-focused consideration—would give rise to a presumption that termination is in a child's best interest—a child-focused consideration. Instead, as the department acknowledges, the legislature expressly contemplated that, even when a parent is unfit and reunification within a reasonable time is improbable, it may not be in a child's best interest to terminate parental rights. The department therefore does not press its original argument for a statutory presumption,[10]

---

[9] *Beasley* addressed an older version of ORS 419B.500 and 419B.504, in which the two provisions above were originally combined. *Former* ORS 419.523 (1991). In 1993, the legislature recodified the statute in SB 257 to its current form. The move made "no substantive change in the law." Exhibit B, Senate Judiciary Committee, SB 257, Feb 15, 1993 (testimony of Judge Stephen B. Herrell).

[10] Before the Court of Appeals, the department relied in part on a statement from this court's decision in *Geist*, 310 Or 176, in arguing that a presumption exists. There, the court stated:

> "Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time so as to provide such an environment, the best interests of the child(ren) generally will require termination of that parent's parental rights."

Id. at 189. In this court, the department does not cite *Geist* for that proposition. As mother notes, *Geist* concerned whether the mother in that case could challenge the adequacy of her counsel on direct appeal, *id.* at 179, and the statement referenced above was made in the context of explaining why the standard to determine adequacy of counsel in juvenile dependency cases should not be the

and we turn to its alternative argument that statutory context provides a legislative "preference"—a preference for *adoption*.

Specifically, the department identifies ORS 419B.476(5) as establishing a hierarchy of preferred placements, with parental reunification as the most desirable option and adoption as the second most:

> "(5) The court shall enter an order within 20 days after the permanency hearing. In addition to any determinations or orders the court may make under subsection (4) of this section, the order shall include the following:
>
> "* * * * *
>
> "(c) If 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 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.
>
> "(d) If the court determines that the permanency plan for the ward should be adoption, the court's determination of whether one of the circumstances in ORS 419B.498 (2) is applicable.
>
> "(e) If the court determines that the permanency plan for the ward should be establishment of a legal guardianship, the court's determination of why neither placement with parents nor adoption is appropriate.
>
> "(f) If the court determines that the permanency plan for a ward should be placement with a fit and willing relative, the court's determination of why placement with the ward's parents, or for adoption, or placement with a legal guardian, is not appropriate."

---

same high standard used in criminal cases, *id.* at 188-89. In other words, the statement was not integral to the court's holding in that case. *See Engweiler v. Persson/Dept. of Corrections*, 354 Or 549, 557, 316 P3d 264 (2013) (stating that dictum has no precedential effect). Moreover, the statement was based, not on any Oregon authority, but on a single case from another jurisdiction. For those reasons, we do not find the statement in *Geist* to be instructive or binding on the issue presented here.

The department asserts that paragraph (e) and (f)'s requirement that the juvenile court explain why reunification and adoption are not appropriate permanency options indicates that the legislature has a preference for adoption when reunification is not the appropriate plan. The department further argues that, by changing a child's plan to adoption at the permanency stage, a court already has determined that adoption is the plan best suited to the meet the child's health and safety needs, a determination that the department argues is relevant in a termination proceeding. Moreover, the department notes, once a permanency plan is changed to adoption, the department is statutorily required to file a petition to terminate parental rights and proceed toward adoption unless the opponent of adoption has proved the existence of a reason not to file the petition. ORS 419B.498(2)(b); *Dept. of Human Services v. S. J. M.*, 364 Or 37, 53, 430 P3d 1021 (2018). That is another clue, it is urged, that when reunification is not appropriate, the legislature prefers adoption and, the department seems to suggest, an indication that the legislature prefers *termination* of parental rights when a child's permanency plan is adoption.

The department is correct that when a court changes a permanency plan from reunification to adoption, the legislature contemplates that a petition for termination of parental rights will be filed. When a court determines that the appropriate permanency plan is adoption, ORS 419B.476(5) requires the court to enter an order providing for that plan, including whether, and if applicable, when the ward will be placed for adoption and a petition for the termination of parental rights will be filed. And ORS 419B.498(3) provides that no petition to terminate parental rights may be filed until after a court has conducted a permanency hearing and has determined that the permanency plan for the child or ward should be adoption. But, the fact that termination is contemplated does not mean it must be ordered. The statutes set out procedural and substantive requirements that still must be met before parental rights are terminated, and those requirements are different from those that apply in a permanency proceeding. In a termination proceeding, the department must prove all of the facts required for termination, including that the best interest

of the child will be served by termination. ORS 419B.500. After a hearing, a court may dismiss a termination petition and entertain a petition for permanent guardianship. ORS 419B.365(1). From the statutes that the department cites for its contextual argument, we do not discern the preference for termination that the department urges.

The legislative history is of no greater help. The "best interest" requirement of ORS 419B.500 was added as an amendment to House Bill (HB) 3200 in 1989. The representative who proposed the amendment explained that the best-interest requirement was the "traditional doctrine" but was not reflected in the termination statute as it was written. Audio Recording, House Committee on Judiciary, Subcommittee on Family Justice, HB 3200, Mar 31, 1989 (statement of Rep Kevin Mannix). A representative from the Department of Justice "strongly concur[red]" that HB 3200 should be so amended, explaining that requiring that termination was in the child's best interest was in case law and that it should be in the statute because termination should not occur merely to punish the parent. Audio Recording, House Committee on Judiciary, Subcommittee on Family Justice, HB 3200, Mar 31, 1989, (statements of Deborah Wilson); Audio Recording, Senate Committee on Judiciary, HB 3200, Mar 30, 1989 (statements of Deborah Wilson). As we understand it, that history demonstrates that the legislature viewed the best-interest inquiry as a consideration that is distinct and separate from the other grounds that the department must establish to obtain termination. We do not discern from that history the preference for termination that the department urges.

In short, there is no indication in the text of ORS 419B.500 that the legislature intended the "best interest" inquiry to be weighted with a presumption or a preference for termination. Nor is there any other support in the statute's context or legislative history to indicate that the legislature intended that, once the department has established parental unfitness and that reunification within a reasonable time is improbable, there is a preference for termination. Rather, ORS 419B.500 requires the juvenile court to determine, from the evidence presented in the termination

proceeding, whether termination is in the child's best interest.

That conclusion also answers the department's more nuanced argument that "the legislative preference for adoption would be dispositive only in the absence of any evidence that the termination of parental rights would have a potential harmful effect on the child." When a court determines that the permanency plan for a child is adoption and the department files a petition for termination, the department still must prove, at the termination hearing, that adoption and termination are in the child's best interest. If the evidence demonstrates that adoption and termination would have a potential harmful effect on the child, then that evidence may support a juvenile court's decision to dismiss the petition. And, when the department establishes that a parent is unfit and that reunification within a reasonable time is not probable, it may not be difficult for the department to meet that burden. Facts that demonstrate the parent's unfitness also may demonstrate that it is in the child's best interest that the parent have no further relationship with the child. So, for instance, if a parent has physically abused a child and the child continues to suffer trauma in the parent's presence, those facts alone may establish that it is in the child's best interest to terminate parental rights. But, when a parent and a child have a positive bond, more may be required. The department is not correct that the absence of evidence that termination will cause potential harm is sufficient to meet the department's burden of proof.

And the department also is incorrect in its related argument that, absent the construction for which it argues, ORS 419B.500 would require the department to disprove the suitability of a permanency plan other than adoption in every case. Under ORS 419B.500, termination does not turn on the appropriate permanency plan. It is true that, in a termination proceeding, a parent may contend that a child's best interest can be met without termination and adoption. If the parent does so, the availability of another permanency plan that will advance the child's best interest, such as a permanent guardianship, may be a factor in a court's decision. But regardless of whether a parent takes that tack, the department's burden remains the same: The

department must prove only that that the parent's conduct justifies termination and that the best interest of the child will be served by termination.

Having concluded that that statutory inquiry requires consideration of the evidence presented, without reliance on a statutory presumption or preference, we turn now to the evidence presented in this case and whether it established that termination of mother's parental rights is in child's best interest. The juvenile court weighed that evidence and permissibly concluded that it did not; child had an interest in maintaining maternal familial relationships, and his interest in permanency could be met through a permanent guardianship. On *de novo* review, the Court of Appeals weighed the facts differently, and, putting more emphasis on child's need for permanency, permissibly reached the contrary conclusion. We allowed mother's petition for review and also review the record *de novo*; we are not bound by and need not defer to the conclusion reached by either of those two lower courts. *See Haguewood and Haguewood*, 292 Or 197, 202-04, 638 P2d 1135 (1981) (conducting *de novo* review without deference to conclusions reached by trial court or Court of Appeals). In *Haguewood*, this court reviewed the lower courts' decisions about equitable division of marital property; termination of parental rights was not at issue. Nevertheless, that case includes teachings material to the task at hand—that *de novo* review may consist of more than the "relatively simple, straightforward process" of "[f]inding facts anew on the record" and may encompass a "more complex" weighing of the facts according to applicable principles. *Id.* at 199. In this case, as in *Haguewood*, both lower courts went about their tasks "with intelligence and sensitivity." *Id.* at 204. We fault neither, but reason differently from both.

We begin with the evidence presented regarding child's need for permanency. MacPhail's testimony and report described the kind of permanency child needs: a consistent and reliable caregiver who offers a high level of consistency, stability, and routine; a caregiver who can advocate for child in both educational and community settings; a caregiver who can expose him to language-rich activities to develop his language skills; a caregiver who can take him

to appointments; and a caregiver who can provide a permanent living situation. Blackwood seemingly agreed with that assessment, stating that, to enable child to progress, he needs to know where he is going to live and who is going to take care of him on a day-to-day basis. Both witnesses testified that child could not wait for mother to engage in additional treatment and recovery before he was placed with a permanent caregiver, and we agree. The real question the lower courts had, and which we must confront, is whether a permanent guardianship can fill that need.

To analyze that question, it is necessary to understand the statutes that pertain to permanent guardianships. The grounds for granting a petition for permanent guardianship are the same as those for termination of parental rights. ORS 419B.365(2).[11] A court may grant such a petition only if it finds that it is in the best interest of the ward that the parents *never* have physical custody of the ward. ORS 419B.365(3)(b).[12] Thus, it appears that, in this case, a court could not make child's foster parents his permanent guardians without finding that mother should never be his caregiver. To the extent that the lower courts considered a permanent guardianship a temporary arrangement that would permit mother more time to obtain treatment and prove herself a fit caretaker, they were mistaken. A permanent guardianship is not intended to serve that purpose. To the extent that the Court of Appeals instead considered a permanent guardianship as an arrangement that would permit mother to bring later legal challenges that would not be available to her if child were adopted and was concerned about the lack of long-term permanency that would therefore exist, we acknowledge that permanent guardianship and adoption may differ in that respect. We do not assign significant weight to those differences here, however.

---

[11] ORS 419B.365(2) provides that the "grounds for granting a permanent guardianship are the same as those for termination of parental rights."

[12] ORS 419.365(3) provides that the court "shall grant a permanent guardianship if it finds by clear and convincing evidence that:

"(a) The grounds cited in the petition are true; and

"(b) It is in the best interest of the ward that the parent never have physical custody of the ward but that other parental rights and duties should not be terminated."

First, a *parent* may not file a motion to vacate a permanent guardianship. ORS 419B.368(7).[13] Although a *court* may vacate a permanent guardianship on its own motion or the motion of a party other than a parent, ORS 419B.368(1), the court's decision to do so must be in the child's best interests, ORS 419B.368(2).[14]

Second, there is no evidence in this record that child's need for permanency is a need to have legal assurance that no court will ever change his placement. The witnesses testified that child's need is a need to be placed with a permanent caregiver without further delay. This is not a case in which there was evidence, for example, that child feared that mother would not accept his uncle and aunt as his permanent caregivers or that child would be harmed if a court were to make a different decision about his best interest in the distant future. The evidence suggests that the immediate security that child needs can be provided through a permanent guardianship.

Third, there was substantial evidence in this case that child had an interest in maintaining his relationship with his mother and his larger maternal family. As noted above, the juvenile court found that child "has a good albeit very limited relationship with Mother." That finding is supported by evidence that child is excited to see mother during visits and has a difficult time separating from her when the visit ends; he typically sits next to mother, without prompting, when the family takes photos. Child's maternal grandparents are significantly involved in his life; they spend a lot of time with child, including going to the library and the YMCA. Child's grandparents, his foster parents, and his mother are all "working together" for child because "family is very important to them." We give that evidence significant weight.

---

[13] This court has allowed review of a case in which a parent successfully moved to dismiss jurisdiction and thereby ended a durable guardianship without seeking to have that guardianship vacated under ORS 419B.368. *Dept. of Human Services v. J. C.*, 289 Or App 19, 407 P3d 969 (2017), *rev allowed*, 362 Or 389 (2018). We do not intend to comment on that case here.

[14] ORS 419B.368(2) provides that a court "may modify a guardianship order if the court determines to do so would be in the ward's best interests."

The same is not true, however, of the juvenile court's suggestion that preserving mother's parental rights might "be an incentive" to her. An assessment of a child's best interest must be child-centered. If a decision that serves a child's best interest also happens to serve a parent's interests, then so be it. But termination may be appropriate even if a parent has a good chance of eventually succeeding in treatment and even if termination would dash a parent's hopes. On *de novo* review, we do not consider the effect that termination would have on mother; we focus solely on its effect on child.

Although we, like the lower courts, recognize that child has an urgent need for a permanent caregiver and should not be required to wait longer to see if mother can fill that role, we also recognize that child is attached, not only to his foster parents, but also to mother and her family. We do not defer to the juvenile court's conclusions that termination of mother's parental rights is not in child's best interest, but we do draw confidence from its experience, knowing that it often has pondered how best to protect children. We conclude, as did the juvenile court, that there is a way to meet child's need for a permanent caretaker without sacrificing his interest in maintaining his maternal family relationships and that termination of mother's parental rights is not in his best interest.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

BALMER, J., concurring.

The court's opinion, which I join without reservation, explains how the "best interest of the child" standard operates in termination proceedings and carefully applies that standard to the facts of this case. I write separately to make two observations about how that opinion should be understood.

First, "this is a close case." *Dept. of Human Services v. T. M. D.*, 365 Or 143, ___, ___ P3d ___ (2019). Reasonable judges could look at the same facts and reach a different conclusion, as did a majority of the *en banc* Court of Appeals. Holding that, on this record, the Department of Human Services failed to carry its burden of showing that

termination would be in the best interest of the child, does not create a sea change, or suggest that other courts in other cases have been too quick to find that termination of parental rights is in a child's best interest.

Second, the court's opinion, and the facts discussed therein, should not be taken to set forth a rubric against which juvenile courts must measure the facts of future cases. Courts adjudicating terminations of parental rights should read carefully those sections of the court's opinion explaining that the "best interest of the child" inquiry should proceed without a presumption in favor of adoption and should be focused on the needs of the child to the exclusion of those of the parents. The application of that standard to the facts in this case may serve as an illustration of how those principles should apply. But the court's opinion does not, in applying the standard, announce a list of criteria that must be satisfied before parental rights can be terminated, or a set of factors that, once proved by a parent, can stand as a bar to termination. A court should not, in short, adjudicate what is in a child's best interests by a process of fact-matching between the case at hand and this one. *See State v. Sierra*, 349 Or 506, 515-16 n 5, 254 P3d 149 (2010), *adh'd to as modified on recons*, 349 Or 604, 247 P3d 759 (2011) ("Fact-matching can be a misleading enterprise."); *Gardner and Gardner*, 212 Or App 148, 156, 157 P3d 320 (2007) (acknowledging that fact-matching is "especially treacherous" in marital dissolution actions); *State v. Roberts*, 183 Or App 520, 524, 52 P3d 1123 (2002) (recognizing that "fact-matching is not helpful" in the civil commitment context). The application of the "best interest of the child" standard requires careful attention to the subtleties of a given case, and is for that reason inimical to the fact-matching between similar cases that may occasionally prove productive in other legal contexts. A future case with facts resembling those of this case in their broad strokes—involving, say, a parent who has no realistic possibility of being able safely to care for his child, but with whom the child has bonded and maintains limited but positive contact—need not come out the same way, even in the absence of some obvious distinguishing feature. It may be enough to say that those factors, though similar, have a difference balance in that case.

Our statutes entrust the weighty decision of whether to terminate parental rights to juvenile courts, subject to *de novo* review by the Court of Appeals and occasionally by this court. *See* ORS 19.415(3)(a). The "best interest of the child" standard, made a prerequisite to termination by ORS 419B.500, requires those courts to make an individualized determination, attentive to the child's particular situation and needs. This court has not previously spoken on the application of the "best interest of the child" standard in termination proceedings, but that should not cause our application of that standard in this single case to wield any outsize influence on how juvenile courts approach their work.