



November 2009

State ex rel DHS v L.S., ___ Or App ___ (November 18, 2009) (Edmonds, P. J.)
(Washington Co.) rev'd and remanded
<http://www.publications.ojd.state.or.us/A141440.htm>

Mother appeals termination of parental rights judgment on grounds of unfitness as to her 8 year old son, R. He is youngest of nine children and mother has a history with DHS going back to 1995 that includes multiple “founded” referrals. In 2003 mother suffered from a cardiac event which caused her to lose oxygen to the brain and resulted in physical and mental impairments. She lost custody of her children to the state in 2003, regained it in 2005 and lost custody of R again in 2006. There was conflicting evidence about the degree of mother’s improvement since 2006 and the adequacy of her plan to parent with help were at issue at the trial level. As the trial court saw it, mother was unfit to parent without assistance and the “real issue was whether mother was able to provide a plan that would make up for her deficiencies.”

In addition to evidence about the bond between mother and child, there was conflicting expert opinion. The Court of Appeals gave credence to the most recent psychological evaluation (there were at least five) and made its own factual findings on some of the issues. Starting with the proposition found in *Rardin* and *Stillman* that the legislature assumes that conditions can change and that termination can only occur where there is present unfitness at the time of trial, the Court of Appeals held:

“If the trial court's judgment is understood to have conflated those two requirements,[unfitness and improbability of reintegration in a reasonable time] then the trial court committed error. In other words, if mother is not unfit, then her parental rights may not be terminated without regard to the viability of the plan that she presented. See *Rardin*, 340 Or at 445. However, we need not decide this case on that issue because of the underlying inadequacy of the evidence.”

L.S. (slip op at 6). The court went on to hold that mother’s

“...present abilities indicate that she will be able to arrange for R's needs to be met when she is personally unable to provide for them. That evidence, even when weighed with conflicting evidence, does not establish that it is highly probable that mother's mental condition at the time of trial rendered her unfit to be R's parent.”

Id.

State ex rel Juvenile Department v N.W., ___ Or App ___ (November 18, 2009)
(Schuman, J.) (Yamhill Co.) affirmed
<http://www.publications.ojd.state.or.us/A141262.htm>

In this appeal from a jurisdictional order, mother argues that the allegations of the petition are insufficient to establish jurisdiction, relying on two earlier cases, *Randall* and *N.S.* The petition alleged that the children's conditions and circumstances endangered their welfare because mother: (1) "has a history of substance abuse"; (2) "has repeatedly allowed convicted and untreated sex offender(s) [to] have contact with her children, despite being advised of the concerns repeatedly by DHS"; and (3) "has refused to submit to a [UA] and has refused to engage in services with DHS to ameliorate the concerns."

The Court of Appeals found *Randall* unpersuasive, distinguishing it because:

"In that case, the *only* allegation in the petition was that the mother used controlled substances, and we held *only* that the allegation was "insufficient *by itself*" to establish jurisdiction. *Id.* at 675 (emphasis added). Here, the allegations regarding mother's substance abuse are complemented by allegations that she allowed untreated sex offenders to be with T. The two allegations together present a more compelling case than either one alone; the danger that is inherent in contact with untreated sex offenders is heightened by the use of controlled substances. Thus, the controlled substance allegations are "a proper consideration."

N.W. (slip op at 5)

Mother next attacked the judgment on the grounds that the proof was insufficient. The appellate court found that it was sufficient and addressed a prior case dealing with allegations of contact with an "untreated sex offender" explaining that

"[i]t is true that, in *State ex rel Dept. of Human Services v. N. S.*, 229 Or App 151, 157-58, 211 P3d 293 (2009), we rejected the state's argument that contact with an untreated sex offender is *per se* dangerous to children even where the state has not demonstrated a nexus between the sex offense and the supposed harm. This case is distinguishable for several reasons. First, in *N. S.*, there were two bases for our conclusion: the nature of the sex offense was unknown, and the record did not establish that the offender would have contact with the child. *Id.* Here, by contrast, mother's repeated inability or unwillingness to keep Swift away from her children, despite warnings, shows that mother does not acknowledge that contact with an untreated sex offender could present a risk and that Swift probably *would* have continued contact with the children, mother's promises to the contrary notwithstanding. Second, the petition in *N. S.* contained only the single allegation that potential contact with the sex offender created a risk of danger. Here, as we discussed with respect to the drug use, the presence of untreated sex offenders in combination with the use of controlled substances

synergistically creates a whole that is more dangerous than the sum of its parts. And third, we can infer from the fact that a court ordered Swift not to contact children that his violation of that order presented a risk of harm to the children that he did contact--L and T.”

Id. at 6,7.

State v. A.L.M. ___ Or App ___ (November 18, 2009) (P.J. Edmonds) (Lane Co.) rev'd and remanded with instructions to terminate wardship
<http://www.publications.ojd.state.or.us/A141708.htm>

Mother appeals a judgment vacating the temporary commitment of her son to DHS but continuing wardship over him and awarding physical custody of the child to father who was given the authority to determine any visitation by mother. Mother argued that the juvenile court could only retain wardship if the conditions originally giving rise to it continued to be in effect. The court held that “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’”, citing *State ex rel Juv Dept. v Gates* 96 Or App 365, 372, 774 P2d 484 *rev den*, 308 Or 315 (1989) After reviewing the allegations and the evidence of the current circumstances, the court held that

“[j]urisdiction over N was originally assumed by the court because mother left the child with inappropriate caregivers and because of father's alcoholism and lack of a custody order. Father's alcohol issues have been rectified so that they no longer endanger N's welfare. Father now has physical custody of N, and mother's act of leaving the child with inappropriate caregivers in the past was not a circumstance that authorized continuing jurisdiction over N in the absence of a continued reasonable likelihood of harm to the child The juvenile court heard no additional evidence that mother continued to represent a threat to N's welfare in light of father's changed circumstances. The facts that mother is involved in other termination proceedings, that she has no case plan for reunification with N, and that she has had little contact with N do not *ipso facto* demonstrate that she represented a threat to N's welfare at the time of the review hearing.

Accordingly, in the absence of any evidence in this case that conditions and circumstances existed at the time of the review that presented a reasonable likelihood of harm to the child, the juvenile court erred in continuing the wardship over N.”

A.L.M. (slip op at 3) (footnotes omitted)

Judge Sercombe filed a lengthy dissent in which he said that he agreed with the majority that in this case the juvenile court was obligated to evaluate whether jurisdiction should continue but distinguished *Gates* and disagreed with the majority's view that “the record does not support continuation of jurisdiction over N and that the state had the burden of going forward with evidence to support all of the allegations in the dependency petition.” *Id.* at 7.

Dept. of Human Services v. B.A.S. ___ Or App ___, ___ P3d ___ (November 25, 2009) (Armstrong, J.) (Klamath Co.)
<http://www.publications.ojd.state.or.us/A141515.htm>

Parents appeal from the denial of their two motions to set aside the judgment terminating their parental rights. Parents' first motion to the trial court was filed while the case was still pending in the Court of Appeals, and before the judgment was ultimately affirmed. Their second motion was filed after the Supreme Court denied review but before an appellate judgment issued. Parents' motions were based on transcript problems that the Court of Appeals had previously addressed by ordering a corrected transcript and allowing the parties supplemental briefing. On appeal, the state urged that the case was moot as the children had already been adopted and the Court of Appeals agreed.

The Court of Appeals began its analysis with the text of ORS 419B.923, the statute under which the parents proceeded in the trial court. Subsection (3) of that statute, by its terms, does not permit an order or judgment to be set aside or modified after a petition for adoption has been granted. This, according to the court operated as an unequivocal bar to setting aside the judgment under this portion of the statute. The court next conducted a lengthy analysis of subsection (8) of the statute including, text, context, legislative history and case law under the analogous civil rule. The court concluded that subsection (8), which states "[t]his section does not limit the inherent power of a court to modify an order or judgment within a reasonable time or the power of a court to set aside an order or judgment for fraud upon the court" could not be read "to 'override' the provision of ORS 419B. 923 (3) and defeat the state's mootness argument." Lastly, the court dispensed with parents' due process argument, using the *Matthews v Eldridge* three part test. While the parent's interest in the care and custody of their children was a commanding one, the risk of erroneous deprivation of those interests, in light of the procedures already available (direct appeal, the appellate court's remedy for the faulty transcript, appellate remedies the parents did not use) was slight and the state's interest in finality was strong. "Here, the disruption and uncertainty that would be created by allowing the trial court to set aside the termination judgment—after the judgment had been affirmed on appeal and after the children have been adopted—is manifest." The court held that due process was not violated and affirmed the trial court.