

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of A. M.,
a Child.

DEPARTMENT OF HUMAN SERVICES,
Petitioner below,

and

A. F.,
Guardian-Respondent,

and

A. M.,
Child-Respondent,

v.

J. C.,
Mother-Appellant.

Lane County Circuit Court
12131J;

Petition Numbers 111313, 12131J01;
A164555

Valeri L. Love, Judge.

Argued and submitted September 8, 2017.

Shannon L. Flowers, Deputy Public Defender, argued the cause for appellant. With her on the brief was Shannon Storey, Chief Defender, Juvenile Appellate Section, Office of Public Defense Services.

George W. Kelly argued the cause and filed the brief for respondent A. F.

No appearance for respondent A. M.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Shorr, Judge.

ARMSTRONG, P. J.

Vacated and remanded.

ARMSTRONG, P. J.

Mother appeals a juvenile court judgment entered after the court denied her motion to vacate a guardianship and terminate the court's wardship over mother's child, A. Because the juvenile court failed to determine whether the bases for jurisdiction over A continued to exist, we vacate and remand for further proceedings consistent with this opinion.

A was removed from mother's care and placed with a relative, Fuller, in March 2012 when A was seven months old. The juvenile court determined that it had jurisdiction over A, as to mother, based on the state proving by default the following allegation:

"The mother's use of alcohol and/or controlled substances interferes with her ability to parent in that while under the influence of alcohol and/or controlled substances, the mother has been unable and/or unwilling to provide the child with the care, guidance and protection necessary for the child's physical, mental and emotional well-being. If left untreated, the mother's substance abuse presents a threat of harm to the child."

At a later permanency hearing, the plan for A was changed from reunification with parents to a durable guardianship under ORS 419B.366. The juvenile court subsequently entered an order and judgment in November 2013 establishing a guardianship, appointing Fuller as A's guardian, and granting Fuller legal and physical custody of A.

In April 2016, mother moved to vacate the guardianship and terminate the court's wardship over A. Mother's motion was based on her having ameliorated the conditions that had given rise to the court's jurisdiction over A by, among other things, abstaining from the use of alcohol and controlled substances since being released from prison in January 2014, establishing visitation with A upon her release, and attending family counseling with A and Fuller.

At the hearing on mother's motion, the court told the parties that, under *Dept. of Human Services v. T. L.*, 279 Or App 673, 379 P3d 741 (2016), mother had the burden of proof on her motion, if Fuller and A opted to put her to that

burden, because the permanency plan for A had already been changed from reunification to guardianship. Fuller and A did opt to put mother to her burden. Mother then put on evidence that she had ameliorated the bases for jurisdiction, *viz.*, that she was clean and sober and, at least, a minimally adequate parent. Mother also put on evidence of her relationship with A, how she would handle the transition of A's care to her if the guardianship were vacated, and that A would still have significant contact with Fuller. As to A's best interests, the family's therapist, Amy Kammerer, testified that "[i]t would be a very detrimental effect on [A] to not see one of them [either Fuller or mother]."

Following the hearing, the court requested, and the parties submitted, written closing arguments. Fuller and A argued that mother's motion had to be denied because mother had not proven that it was in A's best interest to vacate the guardianship as required by ORS 419B.368. Mother argued that, because she had proven that the factual bases for jurisdiction no longer existed, the court was required to terminate wardship and, consequently, vacate the guardianship. After receiving those arguments, the juvenile court denied mother's motion. In its written order, the court noted that mother had cited ORS 419B.368 in her written motion, and made the following findings:

"THE COURT FINDS that the child has spent the majority of her life with the Guardian and is comfortable and well-supported in the Guardian's care. The Court finds the testimony of the child's therapist, Amy Kammerer, to be credible. The Court finds that it is not in this child's best interest to vacate the guardianship."

(Uppercase in original.) The juvenile court then entered a judgment continuing its wardship over A and continuing Fuller's guardianship of A. Mother appeals the judgment, assigning error to the court's denial of her motion to vacate the guardianship and terminate wardship.

Here, Fuller's guardianship of A was established under ORS 419B.366. That statute provides that, "[u]nless vacated pursuant to ORS 419B.368, a guardianship established under this section continues as long as the ward is subject to the court's jurisdiction as provided in ORS 419B.328."

ORS 419B.366(6). Under ORS 419B.328(2), a court’s wardship of a child continues until, among other things, the court “dismisses the petition concerning the ward” or “enters an order terminating the wardship.” In turn, a court is required to terminate wardship over a child if “the bases for the juvenile court’s jurisdiction ‘cease to exist.’” *T. L.*, 279 Or App at 678. When the permanency plan for the child has already been established as a plan other than reunification, a parent making a motion to dismiss based on lack of jurisdiction has the burden of proof “unless the proponents of jurisdiction opt not to put them to their burden.” *Id.* at 677. As a result of the above, mother argues that, because she proved that she had ameliorated the factual bases for the court’s wardship over A, the court was required to terminate the wardship and vacate the guardianship because the guardianship could not continue, as provided in ORS 419B.366(6).

Fuller relies, in response, on the statute governing the vacation of guardianships, ORS 419B.368. That statute provides, in part, that

“(1) The court, on its own motion or upon the motion of a party and after such hearing as the court may direct, may review, modify or vacate a guardianship order.

“(3) The court may vacate a guardianship order, return the ward to the custody of a parent and make any other order the court is authorized to make under this chapter if the court determines that:

“(a) It is in the ward’s best interests to vacate the guardianship;

“(b) The conditions and circumstances giving rise to the establishment of the guardianship have been ameliorated; and

“(c) The parent is presently able and willing to adequately care for the ward.”

Fuller argues that, because ameliorating the bases for the guardianship is only one of the three things required to be proven to authorize a juvenile court to vacate a guardianship under ORS 419B.368, the court could not vacate the guardianship on the basis for which mother contends. Fuller

asserts that reading the statutes in the way advocated by mother would mean that sections (3)(a) and (3)(c) in ORS 419B.368 have no practical effect, because the only section a parent would have to prove to have a court terminate a guardianship would be (3)(b).

We conclude that the juvenile court erred by failing to determine whether it continued to have jurisdiction over A and, thereby, could continue the guardianship. By the plain terms of ORS 419B.366, a guardianship established under that statute can continue only if the court continues to have jurisdiction over the child. ORS 419B.366(6). In turn, a juvenile court is not permitted to retain jurisdiction over a child if the jurisdictional bases cease to exist. *See, e.g., T. L.*, 279 Or App at 678. And, as we explained in *T. L.*, permitting a parent to bring a motion to dismiss jurisdiction up until the parent's rights are terminated is consistent with the legislature's intention in the juvenile dependency statutes. *Id.* at 689.

Although mother cited ORS 419B.368 in her motion, mother not only moved to vacate the guardianship, she moved to terminate the wardship on the ground that the jurisdictional bases no longer existed. For purposes of the latter motion, the court was required to confront the two-part inquiry discussed in *T. L.*:

“The court must determine whether the original bases for jurisdiction continue to pose a current threat of serious loss or injury. If the court determines that they do, it then must assess the likelihood that that risk will be realized. *** If there is no reasonable likelihood of harm to the child's welfare in the absence of dependency jurisdiction, there is no basis for dependency jurisdiction to continue.”

279 Or App at 685 (citations omitted). Because the juvenile court did not confront whether it could continue its jurisdiction over A, as discussed in *T. L.*, we vacate and remand for the juvenile court to make that determination.

Vacated and remanded.