

FILED: December 7, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of N. E. F.-J., a Child.

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

v.

B. L. J.,
Appellant.

Jackson County Circuit Court
080046J

Petition Number
080046JB

A148452 (Control)

In the Matter of A. L. J., a Child.

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

v.

B. L. J.,
Appellant.

Jackson County Circuit Court
110067J

Petition Number
110067JA

A148454

Lisa C. Greif, Judge.

Argued and submitted on October 05, 2011.

Shannon Flowers, Deputy Public Defender, argued the cause for appellant. With her on the brief was Peter Gartlan, Chief Defender, Appellate Division, Office of Public Defense Services.

Samuel A. Kubernick, Assistant Attorney General, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and Mary H. Williams,

Solicitor General.

Before Haselton, Presiding Judge, and Armstrong, Judge, and Duncan, Judge.

DUNCAN, J.

Reversed.

1 DUNCAN, J.

2 Mother appeals the juvenile court's judgments taking jurisdiction over her
3 children, N and A, asserting that the judgments are not supported by sufficient evidence.
4 Mother acknowledges that she has cognitive deficits that prevent her from parenting
5 independently but contends that, because the undisputed evidence at the jurisdictional
6 hearing was that she was living with another adult who was willing to supervise and
7 support her in her parenting, the children's circumstances did not justify juvenile court
8 jurisdiction. We agree and reverse.

9 We have the discretion to review this case *de novo*, ORS 19.415(3)(b), but
10 the parties do not ask us to do so, and we decline to do so. *See* ORAP 5.40(8)(c) (we
11 exercise our discretion to review *de novo* only in "exceptional" cases). Therefore, "our
12 task is to review the facts found by the juvenile court to determine whether they are
13 supported by any evidence and then to determine whether, as a matter of law, those facts
14 together with facts implicitly found by the juvenile court provide a basis for juvenile
15 court jurisdiction[.]" [*Dept. of Human Services v. C. Z.*](#), 236 Or App 436, 442, 236 P3d
16 791 (2010).

17 The relevant facts are few and undisputed. In January 2011, the
18 Department of Human Services (DHS) filed dependency petitions on behalf of N and A.
19 Both petitions alleged that mother has cognitive limitations "which impair her ability to
20 care for the child." At the time of the filings, N had recently been surrendered to DHS by
21 his paternal aunt, who had been caring for him, and was in community foster care. A,

1 who was born in late December 2010, was living with mother.

2 In March 2011, when N was three years old and A was three months old,
3 the juvenile court held a hearing on the petitions. DHS presented evidence that mother
4 has "mild mental retardation." According to the DHS witnesses who worked with mother
5 during parenting classes and supervised visits, mother is loving, patient, and kind.
6 Mother has learned certain parenting skills and can apply them as demonstrated, but she
7 has a limited ability to anticipate and respond to new situations. She also has a limited
8 understanding of child development. As a result, mother has failed, at times, to respond
9 to N's needs and recognize potential safety hazards. For example, according to one DHS
10 witness, mother continued to treat N as a baby when he was more than a year old; she
11 would give him a bottle or rock him when he fussed, even if that was not what he wanted
12 or needed, because she could not read his cues. According to the same witness, mother--
13 who is easily distracted and eager to please others--would engage in conversations with
14 other adults and allow N to toddle across a room and put himself in places where he
15 could fall or objects could fall on him. None of the DHS witnesses who evaluated or
16 worked with mother believed that mother could parent N and A on her own.

17 At the jurisdictional hearing, mother did not contend that she could parent
18 N and A independently. Instead, she contended that she could parent the children with
19 the assistance of a family friend, Bingham. At the time of the hearing, mother and A had
20 been living with Bingham and Bingham's husband for approximately two months.
21 Bingham testified that she and her husband "love" having mother and A in the house.

1 Bingham also testified that she and her husband had discussed having N live with them as
2 well, and they were willing to "have another little one running around."

3 While living with Bingham, mother was responsible for A's care. Bingham
4 testified, "I told [mother] the same thing I told my boys, I am not a built in babysitter.
5 You are the mom, you're responsible. Any questions, any problems, I'm here, but [you
6 are] the mom." Bingham further testified that she and her husband

7 "told [mother], 'We're willing to teach you and be all the support you need
8 as long as you want it, but you've got to,' you know, * * * she's got to carry
9 it on herself. Because she's got to really prove that she wants--I believe in
10 tough love. I've had to do it with two of my kids. So, you know, there is
11 just--if you want something bad enough you will work for it. And that's
12 just my philosophy on life, you know. The harder you work for something,
13 you will achieve it."

14 After the presentation of evidence, DHS's counsel argued that "the question
15 here is whether or not [mother] is able to parent by herself. That's what the allegation
16 says is that [mother] has cognitive limitations that impair her ability to parent." Mother's
17 counsel responded that "[t]here is no requirement by statute or case law that a parent must
18 be able to independently parent their child or children and then they'll be taken away if
19 they can't." Mother's counsel summarized:

20 "So I don't think the Court can take jurisdiction even if you find her
21 ability to care for the child is impaired because she is making all the
22 arrangements necessary for the child's safety and well-being. And we often
23 forget about the prelude to the allegations that the child's parents are failing
24 to provide them with the care, guidance, and protection necessary. She is
25 making these arrangements and has."

26 At the end of the hearing, the juvenile court concluded that the state had
27 proved that mother has cognitive limitations but took under advisement the question of

1 whether those limitations impaired mother's parenting. Shortly thereafter, the court
2 entered written judgments finding that the state had proved that mother has cognitive
3 delays that impair her ability to parent the children. The court made no findings
4 regarding the nature or adequacy of the supervision and support mother was receiving
5 from Bingham.

6 On appeal, mother argues, as she did below, that "the juvenile code does
7 not require that a parent be able to *personally* provide all care for her children, so long as
8 the inability to provide care does not endanger them, *i.e.*, another adult is present and
9 capable of caring for the children." (Emphasis in original.) She also argues that the
10 possibility "that [she] might choose to leave her supportive environment *at some point in*
11 *the future* does not establish a *current* threat of serious loss or injury." (Emphasis in
12 original.)

13 In response, DHS argues that "mother's cognitive limitations and inability
14 to parent independently in a safe manner represent a current threat of harm to the
15 children." DHS further argues that, even though mother and A were living with Bingham
16 at the time of the jurisdictional hearing, "the threat of harm to the children's welfare was
17 still current" for two reasons. First, according to DHS, "it is questionable whether
18 Bingham could provide the level of parenting supervision and support that mother and
19 both children need[.]" Second, because of the voluntary nature of mother's living
20 arrangement with Bingham, "mother is free to leave at any time."

21 With the arguments thus framed, we turn to the relevant law. As we

1 explained in State v. S. T. S., 236 Or App 646, 654, 238 P3d 53 (2010):

2 "Under Oregon's juvenile code, a juvenile court has 'exclusive original
3 jurisdiction' in a case involving a child '[w]hose condition or circumstances
4 are such as to endanger the welfare of the person or of others,' ORS
5 419B.100(1)(c), or whose parents '[f]ailed to provide the person with the
6 care, guidance and protection necessary for the physical, mental or
7 emotional well-being of the person,' ORS 419B.100(1)(e)(D). Our cases
8 have established that a child's 'condition or circumstances' warrant the
9 protection of juvenile court jurisdiction when, 'under the totality of the
10 circumstances, there is a reasonable likelihood of harm to the welfare of the
11 child.' State ex rel Juv. Dept. v. Vanbuskirk, 202 Or App 401, 405, 122 P3d
12 116 (2005) (citing State ex rel Juv. Dept. v. Smith, 316 Or 646, 652-53, 853
13 P2d 282 (1993))."

14 (Brackets in *S. T. S.*) The focus of the jurisdictional inquiry is the *child's* condition or
15 circumstances. *S. T. S.*, 236 Or App at 654. In order for the child's condition or
16 circumstances to justify juvenile court jurisdiction, they must give rise to a current "threat
17 of serious loss or injury to the child." *Dept. of Human Services v. A. F.*, 243 Or App 379,
18 386, 259 P3d 957 (2011).

19 DHS bears the burden of proving facts sufficient to justify jurisdiction. *C.*
20 *Z.*, 236 Or App at 443. Thus, in this case, DHS had to prove that, under the totality of the
21 circumstances, there was a reasonable likelihood of harm to the children's welfare.

22 It failed to do so. As mentioned, DHS's argument at the jurisdictional
23 hearing was that the juvenile court could take jurisdiction over the children because
24 mother could not parent them independently. But, as mother correctly argued at the
25 hearing, there is no legal requirement that a parent be able to care for his or her children
26 independently. See State ex rel Dept. of Human Services v. Smith, 338 Or 58, 86, 106
27 P3d 627 (2005) (observing that "there is no statutory requirement that parent be able to

1 care for the child 'independently.' All that [the juvenile code] requires is that the parent's
2 inability to parent the child independently not work to the detriment of the child.").

3 Perhaps because DHS believed that the only question in the case was
4 whether mother could parent independently, it failed to present evidence to establish that,
5 "*under the totality of the circumstances*, there [was] a reasonable likelihood of harm to
6 the welfare of the child[ren]." *Vanbuskirk*, 202 Or App at 405 (emphasis added). As
7 described, at the time of the jurisdictional hearing, Bingham and her husband were
8 willing to have mother and N and A live with them and to support mother in her
9 parenting. DHS failed to carry its burden of proving that there was a "reasonable
10 likelihood of harm," *id.*, to the children in such an environment. In other words, DHS
11 failed to prove that the children would be at risk of "serious loss or injury," *A. F.*, 243 Or
12 App at 386, while living with mother in Bingham's house.

13 As mentioned, DHS argues that, even if the children will not be at risk in
14 Bingham's house, mother might leave Bingham's house. That is true, but DHS must
15 prove that there is a *current* risk of harm. *S. T. S.*, 236 Or App at 654. Although there
16 may be cases in which a parent's past conduct provides a basis for concluding that it is
17 reasonably likely that the parent will change his or her children's circumstances to their
18 detriment, this is not such a case. The record provides no basis for concluding that it is
19 reasonably likely that mother will leave her current supportive environment.

20 Reversed.