

NO. 79440-5

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of H.S., a minor child

Department of Social and Health Services, State of Washington

Petitioner,

v.

H.S.,

Respondent.

DSHS REPLY IN SUPPORT OF DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

The State of Washington, Department of Social and Health Services (“DSHS” or “Department”) offers this reply in support of its motion for discretionary review.

II. SUMMARY OF ARGUMENT

H.S. claims that the errors committed by the court of appeals are merely theoretical because the case has been remanded for a full hearing, and therefore it is possible that dependency might not ever be established. Answer at 8. H.S.’s position fails to recognize that the court of appeals has erroneously interpreted the dependency statute, and on remand – as well as in future cases – the trial court will be bound to follow this same erroneous interpretation of the law.

For the last century, the law has consistently prohibited a finding of dependency, and removal of a child from the parents’ custody, solely because the child has special needs and those needs create financial difficulties for the parents. The court of appeals decision presents a significant departure from this established law, and creates an issue of substantial public interest that should be resolved by this Court.

III. ARGUMENT

A. A Remand Of This Case Will Not Cure The Legal Errors Committed By The Court Of Appeals

In his answer H.S. asserts that once the trial court on remand applies the correct legal standard, it is possible that dependency will not be established and therefore this Court should decline to accept review. Answer at 8.

The issue created by the court of appeals cannot be resolved by a remand in this particular case for application of the “correct” legal standard. It is the standard articulated by the court of appeals that is at issue. The published court of appeals decision sets out a standard that is contrary to long established dependency/termination law.

According to the court of appeals decision, a prima facie case of dependency is established if a person (including, but not necessarily, a parent) shows that a child has special needs which the parents cannot adequately meet in the home because one parent works full time outside the home, and the family cannot afford to continue paying for their child’s residential care.

This newly articulated legal basis for dependency dispenses entirely with any requirement that the parent is abusive, neglectful, or otherwise deficient in their parenting of the child, and permits dependency

to be established based solely on the special needs of the child and the financial circumstances of the family. This conflicts with every reported case by the court of appeals, this Court, and the U.S. Supreme Court. See Department's Motion at 7-12.

H.S. further argues that the Department should direct its complaint to the legislature instead of this Court because the legislature intended to permit the establishment of dependency in cases such as this. Answer at 12-13. H.S. is mistaken.

The legislature has directed that dependency not be established absent a finding of *parental* unfitness and that children not be removed from their parents care and custody absent a showing that the *parent* might harm the child. RCW 13.34.030 (5)(a), (b), and (c); RCW 26.44.010; Wash. Laws of 2005, ch. 512§ sec. 2. The legislature has determined that dependency cannot be established based solely on the special needs or disability of a child and has made it clear that neither homelessness nor poverty of a parent on its own is sufficient to establish dependency. RCW 26.44.015 (3), Wash. Laws of 2005, ch. 512 § 5(15). Finally, the legislature has repeatedly stated that the dependency law does not create a private right of action against the state and may not be used as a vehicle for parents to affirmatively assert an entitlement to services by the state.

RCW 13.34.110 (2); RCW 13.34.350; RCW 74.13.045, Wash. Laws of 2005, ch. 512 §6(6).

The court of appeals decision conflicts with both established case law and legislative directives. It permits dependency to be established without regard to parental deficiencies, but solely because the child has special needs, requiring one parent to work full time or to enlist the help of others in caring for their child. If allowed to stand, the decision will permit parents to demand that the state assume custody and responsibility for providing mental health or other medical care of their children whenever the family would otherwise experience financial hardship in providing this care for their children.

Contrary to H.S.'s assertions that the court of appeals merely applied existing law, the court of appeals decision has transformed the law of dependency into an entitlement proceeding by which the state has become the private insurer for all families having financial difficulty meeting the medical needs of their children. Indeed, the trial court recognized the flaw in the parents' legal theory of the case when it questioned how the facts of this case are any different than a case involving a child who is in need of a bone marrow transplant, which the parents cannot afford. RP 47 There is no legal difference. For the same reason that dependency cannot be established for a medically fragile child

who has extensive medical needs requiring hospitalization, it cannot be established for this mentally ill youth who might require residential care.

The legislative decision to serve children who have severe mental illness but adequate parents through the mental health system rather than under the dependency and termination statute was by legislative design, not oversight. The legislature has directed that children who have severe mental illnesses, like developmentally disabled children, who have fit parents, but who cannot be cared for in their home, be served outside the context of a dependency proceeding. RCW 74.13.350; RCW 71.24 *et. seq.*, RCW 71.34 *et. seq.*; RCW 26.44.015 (3) (“No parent may be deemed abusive or neglectful solely by reason of the child’s ...handicap.”). Indeed, when the legislature amended the dependency statute to separate the provision of services to developmentally disabled children from those provided abused and neglected children served through the dependency process, it was for the purpose of improving services to both populations. See message at end of Wash. Laws of 1997, ch. 386, § 14 and 20.

Contrary to H.S.’s argument that the state “seemingly acknowledges that such services are not as a practical matter readily available to those who cannot pay for them” the Department has consistently taken the position that residential mental health services are

indeed available, and the parents in this case could have pursued these services, but chose not to apply because of the parents' own perception that the services were inadequate. See Department's Motion at 16, and RP 143, 218.

B. The Court Of Appeals Should Not Have Conducted A De Novo Review Of The Evidence Presented, And Should Have Deferred To The Findings Of The Trial Court

H.S. argues that the Department invited error in the court of appeals by advocating an incorrect standard of review. Answer at 13. This argument is not well taken.

The question of whether the trial court weighed the evidence, or ruled as a matter of law, was initially confusing even to H.S. who argued that the court of appeals should apply an 'abuse of discretion' standard of review. Appellant's brief at 10, 13. However, the trial court granted dismissal based on CR 41(b)(3) which requires the trial court to make findings of fact as provided in CR 52(a). The trial court did just that and adopted certain proposed findings and rejected others based on the evidence presented by the parents. See Appendix B to the Department's Motion. Because H.S. assigned error to certain findings, but not others, in his appellate brief, he is not well positioned to assert that the trial court did not weigh the parents' evidence. See Appellant's brief at 1-3.

Although the ultimate conclusion of whether the trial court's findings were sufficient to establish a prima facie case for dependency is indeed a question of law, the findings made by the trial court are supported by substantial evidence and, therefore, are entitled to deference. See Department's Motion at 17-20; Gormley v. Robertson, 120 Wn. App. 31, 83 P. 3d 1042 (2004).

IV. CONCLUSION

The Department respectfully requests that this Court accept review of this case, and reverse the court of appeals.

RESPECTFULLY SUBMITTED this 12th day of December, 2006.

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