

NO. 72914-4-I

COURT OF APPEALS, DIVISION I OF THE STATE OF
WASHINGTON

CONCEPCION WHITTENBURGE,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL &
HEALTH SERVICES,

Respondent.

RESPONDENT'S
MOTION TO DISMISS
APPEAL PURSUANT
TO RAP 3.1 AND RAP
18.9

IDENTITY OF MOVING PARTY

Respondent, the Department of Social and Health Services (Department), by and through its attorneys, Robert W. Ferguson, Attorney General, and Amanda M. Beard, Assistant Attorney General, moves this Court for an order dismissing review pursuant to RAP 3.1 and RAP 18.9.

II. RELIEF SOUGHT

The Department requests this Court enter an order dismissing this appeal pursuant to RAP 3.1 and RAP 18.9(c)(2). The Petitioner, Concepcion Whittenburge, is deceased. As such, there is no party with standing to appeal the Superior Court's order. Further, any issues that Ms. Whittenburge's attorney can raise on appeal are moot because this Court cannot grant any effective relief.

III. STATEMENT OF FACTS

On June 25, 2012, Concepcion Whittenburge sought payment for an individual home care provider under Washington's Medicaid COPES (Community Options Program Entry System) Program. CP 43. On July 20, 2012, the Department denied the request for payment because the proposed individual provider was not qualified to provide in-home care services based on character, competence, and suitability. CP 66. Ms. Whittenburge's proposed provider previously had a personal care contract terminated by Ms. Whittenburge due to alleged neglect. CP 43. As a result, the Department denied Ms. Whittenburge's new request for payment with that provider. *Id.* Ms. Whittenburge's administrative appeal of the Department's decision was denied when the Washington Health Care Authority Board of Appeals affirmed the Department's decision. CP 44.

On June 25, 2014, Ms. Whittenburge filed a petition for judicial review (Petition) of the administrative order denying payment. *Id.* Ms. Whittenburge asked the superior court to order that the Department pay her selected individual provider for services to be rendered in the future; she made no claim for reimbursement for past personal care services rendered or for a money judgment. CP 78.

At oral argument on the Petition on November 3, 2014, Ms.

Whittenburge's attorney advised the superior court her client had passed away. The superior court found that the issues raised in the Petition were moot because the Petitioner was deceased and the court could not grant any effective relief. CP 20. The superior court additionally made findings on the merits of the issues raised in the Petition in the event an appellate court disagreed that the Petition was moot. CP 20–21. The court found the Department had the authority under its rules to deny payment for personal care services. CP 21. The superior court denied the Petition. CP 21.

Ms. Whittenburge's attorney moved for reconsideration of that portion of the Superior Court's order that addressed the merits of the Petition for Judicial Review, and asked that the Court enter a new order of dismissal based only on the mootness of the Petition. CP 19. Additionally, Ms. Whittenburge's attorney filed a motion to vacate the order on the same grounds. CP 11–13. On December 4, 2014, the Superior Court denied both motions. CP 1. Ms. Whittenburge's attorney appealed the December 4, 2014 order to this Court.

IV. STATEMENT OF GROUNDS

A. This Court Should Dismiss The Appeal Due To Lack Of Standing

In this case, no party has standing pursuant to RAP 3.1 to appeal the superior court's order. Only an aggrieved party may seek review by

the appellate court. RAP 3.1. An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected. *Cooper v. City of Tacoma*, 47 Wn. App. 315, 316, 734 P.2d 541 (1987). Here, the aggrieved party would have been Ms. Whittenburge but she is deceased. The attorney who represented Ms. Whittenburge in the judicial review proceeding has not demonstrated that she has a proprietary or pecuniary interest in this matter, or that her personal rights are substantially affected. She is not an aggrieved party and has no standing to an appeal of the superior court's order.

In rare cases, a person who is not formally a party to a case may have standing to appeal a court's order if the order directly impacts that person's legally protected interests. *State v. G.A.H.*, 133 Wn. App. 567, 574, 137 P.3d 66 (2006). For example, in *Johnson v. Jones*, 91 Wn. App. 127, 131–32, 136–37, 955 P.2d 826 (1998), the court allowed an attorney to appeal CR 11 and CR 37 monetary sanctions ordered against him by the superior court. *Id.* at 131–32. It did not, however, allow the attorney to appeal the superior court's denial of his client's motion to strike the trial date, its dismissal of his client's third party claims, or its exclusion of the testimony of one of his client's witnesses as a discovery sanction. *Id.* at 136–37. The court found the attorney could not seek review of those assigned errors as an aggrieved party because he was not a party in the

action below and his rights were not affected by those rulings. *Id.*

Similarly, in *In re Lasky*, 54 Wn. App. 841, 850, 776 P.2d 695 (1989), the appellate court allowed an attorney who was not a party to the original action to appeal an order imposing CR 11 sanctions denying him attorneys' fees because the order affected his pecuniary rights. *Id.* at 848. However, it also found the attorney had no standing to appeal the order dismissing his client's trust and removing him as a guardian. *Id.* at 850; *See also Breda v. B.P.O. Elks Lake City 1800*, 120 Wn. App. 351, 353, 90 P.3d 1079 (2004) (holding that an attorney could appeal as an aggrieved party where order sanctioned the attorney). Although an attorney may appeal sanctions on his own behalf, he may not appeal decisions that solely affect his client because his rights are not affected by those rulings and he is not an aggrieved party under RAP 3.1. *Id.* at 850.

Here, Ms. Whittenburge's attorney has no personal, pecuniary, or property interest in the outcome of this appeal. Ms. Whittenburge's request for relief on judicial review was for reinstatement of her preferred individual caregiver. CP 78. Ms. Whittenburge does not require any future care. Because Ms. Whittenburge is deceased, her claim is extinguished and there is no aggrieved party to pursue her claim. This includes Ms. Whittenburge's attorney, because the superior court order does not affect any legally protected interest of Ms. Whittenburge's

attorney. This Court should dismiss this appeal because Ms. Whittenburge's attorney lacks standing as an aggrieved party.

B. This Court Should Dismiss The Appeal Pursuant to RAP 18.9(c)(2) Because The Appeal Is Moot

Additionally, this Court should dismiss this appeal because it is moot. Ms. Whittenburge passed away prior to issuance of the superior court order and this Court can no longer provide effective relief. This Court will, on motion of a party, dismiss review of a case if the application for review is moot. RAP 18.9(c)(2). An appeal is moot where it presents a purely academic issue and where it is not possible for the court to provide effective relief. *Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004); *Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 447, 759 P.2d 1206 (1988). As a general rule, the court will not review a moot case. *Horner*, 151 Wn.2d at 891. This Court, in its discretion, may review a moot case if the issues presented by the appeal involve matters of continuing and substantial public interest.¹ *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972).

In deciding whether a case presents issues of continuing and

¹ At the time of writing this motion, the Department had not received Petitioner's appeal brief. The Department presumes that Petitioner will argue the Court should take the matter under review as the issues in the appeal involve matters of continuing and substantial public interest. The Department bases this presumption on Ms. Whittenburge's attorney's oral argument on judicial review in which she requested the superior court rule on the merits for the same reason.

substantial public interest, the court considers: (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide further guidance to public officials; and (3) whether the issue is likely to recur. *Sorenson*, 80 Wn.2d at 558. On occasion, the courts have applied other factors, including the level of genuine adverseness and the quality of advocacy of the issues. *Hart*, 111 Wn.2d at 448.

Actual application of the three criteria to each case where the exception is urged is necessary to ensure that an actual benefit to the public interest in reviewing a moot case outweighs the harm from an essentially advisory opinion. *Id.* at 450. Most cases where the appellate courts have applied the continuing and substantial public interest exception to the mootness doctrine fall within three broad categories: constitutional interpretation; the validity and interpretation of regulations and statutes; and matters deemed sufficiently important by the appellate court to warrant review. *Id.* at 449.

An appellate court will accept review of an otherwise moot case where the facts implicate all three of the public exception considerations. For example, in *Sorenson v. City of Bellingham*, the Washington State Supreme Court accepted review of a moot case because it involved a question of great public importance. 80 Wn.2d at 549. In that case,

Sorenson brought a declaratory judgment proceeding against the City of Bellingham to challenge the city's denial of his application to run for office on the ground that he did not own real property in the city. *Id.* The City's action was upheld by the superior court and Sorenson appealed. *Id.* The Washington Supreme Court found that Sorenson's case was moot and that no effective relief could be granted to Sorenson because the election was held while the appeal was pending. *Id.* at 558.

However, the Court, in its discretion, retained and decided the appeal under the public interest exception to mootness. *Id.* The Court found that despite resolution of Sorenson's controversy, the real merits of the case remained unresolved; namely, whether the city's requirement of property ownership as a condition to run for office violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 558–59. The Court found that this was an issue of great public importance which would likely reoccur in the future for other state governments, including the City of Bellingham. *Id.* at 559. For these reasons, the Court determined it was desirable to decide the question for future guidance of public officers. *Id.*

The public interest exception does not apply in this case. The merits of this case are limited to its narrow and unique facts and do not pose a broader question of public interest like those in *Sorenson*. Even if

the Court were to grant Ms. Whittenburge's initial request and reinstate the provider, it would be futile as the need for care by that particular provider for Ms. Whittenburge is extinguished by Ms. Whittenburge's death. Ms. Whittenburge's stated interests are purely theoretical at this point and do not implicate a question of importance for the broader public interest. Any judgment from this Court would be ineffective and be a purely academic, administrative, or philosophical conclusion. Appellate review of cases with unique facts, such as those presented in this case, provides little authoritative guidance to other public officials.

Further, unlike the issue presented in *Sorenson*, this appeal does not present an issue that is likely to recur. To satisfy this prong of the public interest exception, a petitioner must show that the case is "capable of repetition, yet evading review" because there is a reasonable expectation or demonstrated probability that the same controversy will recur involving the same complaining party. *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982); *Hart*, 111 Wn.2d at 451-452. Here, there is no probability that the same controversy will recur because the complaining party has passed away. To the extent other individuals may seek to make similar challenges to orders denying payment, those matters will be decided on the merits of the facts of each case. This Court should decline review because the issue is moot and this

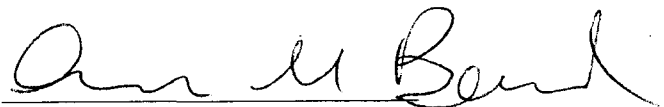
case does not present an issue of continuing and substantial public interest which would warrant review despite mootness.

V. CONCLUSION

This Court should dismiss Ms. Whittenburge's appeal. Ms. Whittenburge's attorney does not have standing to bring this appeal and there is no effective relief that this Court may provide. Further, this appeal is moot. This case does not present any issues of continuing and substantial public interest to compel the Court to consider an exception to the general rule that a moot case will not be reviewed. This Court should decline to review this case and dismiss Ms. Whittenburge's appeal.

RESPECTFULLY SUBMITTED this 17 day of February,
2015.

ROBERT W. FERGUSON



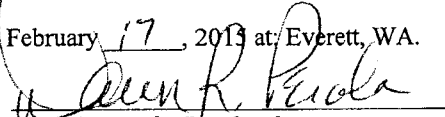
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I, Dawn R. Perala, certify under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: I sent via Electronic Filing - the original copy of this Motion to Dismiss Appeal to the: Court of Appeals, Division I; and a copy via legal messenger to petitioner's attorney of record, Mary C. Anderson.

Dated: February 17, 2013 at: Everett, WA.

By:


Dawn R. Perala, Paralegal

WASHINGTON STATE ATTORNEY GENERAL

February 17, 2015 - 8:33 AM

Transmittal Letter

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Case Name: Concepcion Whittenburge

Court of Appeals Case Number: 72914-4

Party Represented: State of Washington, Dept. of Social and Health Services

Is this a Personal Restraint Petition? Yes No

Trial Court County: Snohomish - Superior Court #
14-2-04713-2

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Comments:

No Comments were entered.

Sender Name: Dawn Perala - Email: dawnc1@atg.wa.gov