Court of Appeals No. 72914-4-I

IN THE WASHINGTON COURT OF APPEALS
DIVISION ONE

CONCEPCION WHITTENBURGE,

Appellants/Plaintiffs,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES OF THE STATE OF WASHINGTON,

Respondent/Defendant.

APPELLANT'S RESPONSE ON RESPONDENT'S MOTION TO DISMISS

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I. IDENTITY OF RESPONDENT ON MOTION

The respondent on the present motion is Appellant Concepcion Whittenburge.

II. RELIEF REQUESTED/INTRODUCTION

Despite not raising the argument in the trial court, the Department of Social and Health Services ("DSHS") asks this court to dismiss this appeal claiming that there is no standing on appeal by any named party [1] and that the case is moot. The Estate of Concepcion Whittenburge ("Estate") could not agree more on the mootness issue. The standing issue is solved by the pending Motion to Substitute filed contemporaneously with this Response. Ms. Whittenburge passed away on October 18th, 2014 while an action was pending in the Snohomish County Superior Court entitled *Concepcion Whittenburge vs. Department of Social & Health Services* under Cause No. 14-2-04713-2 ("Action"). The Action was an appeal from a decision by DSHS that Ms. Whittenburge's chosen caregiver was unfit to care for her. CP 66. Despite the fact that the trial court concluded that the matter was moot, it still entered an order on the merits despite the fact that it

[1] Pursuant to RAP 3.2, the Estate of Concepcion Whittenburge has made a motion to substitute in a party which has been filed contemporaneously with this response.

lacked jurisdiction to do so. This appeal seeks to correct that portion of the court's order which the trial court did not have jurisdiction to enter. CP 20-22. Given DSHS's stated position in the Motion to Dismiss, it is highly likely that this appeal can be resolved in a summary fashion by a Motion on the Merits as to the trial court's lack of jurisdiction once it determined the matter to be moot. The Motion to Dismiss should be denied.

III. ISSUES PRESENTED FOR REVIEW

1. Whether this matter should be dismissed based on standing when there is a contemporaneous motion to substitute in the Personal Representative of the Estate of Concepcion Whittenburge?

2. Whether this court has jurisdiction to hear an appeal from a trial court order on the merits of the claim which was entered after the trial court declared the underlying action moot due to the death of one of the parties?

IV. STATEMENT OF THE CASE

Washington Administrative Code 388-71-0505 provides that qualifying individuals may choose an Individual Provider ("IP"). Ms. Whittenberge qualified under those provisions. On or about July 20, 2012 Ms. Whittenburge was denied her choice of Individual

Provider ("IP") based on an earlier summary suspension of her chosen IP in March 2011. DSHS chose to terminate Ms. Whittenburge's choice of IP citing neglect, even though the IP was successful in dismissing the alleged neglect allegations. CP 69. Ms. Whittenburge had a statutory right to appeal the March 2011 summarily suspension but did not receive a notice informing her she had the right to appeal. CP 75.

After, the allegation of neglect was dismissed by DSHS, Ms. Whittenburge's chosen IP applied to become Ms. Whittenburge's caregiver on or about June 2012; however, her chosen IP was denied. CP 43. Ms. Whittenburge received notice that her chosen IP was denied. At which time, Ms. Whittenburge appealed that denial as she disagreed with the denial by DSHS. CP 44. Based on that denial, she appealed and the case went to hearing. The administrative law judge and board of appeal judge affirmed DSHS's denial of Ms. Whittenburge's choice of IP based on the allegation of neglect, even though DSHS changed its initial findings to inconclusive and thus no evidence of neglect was before them. CP 69.

On June 25, 2014 Ms. Whittenburge timely appealed the board of appeal judge's final order to the Snohomish County

Superior Court by filing the Action. On October 18th, 2014, Ms. Whittenburge passed away. At a hearing on November 3, 2014, the Trial Court heard arguments from both DSHS and Ms. Whittenburge's counsel. The Court ruled that the appeal was moot because Ms. Whittenburge had passed away and thereafter could not grant any effective relief. CP 20. Curiously, after having ruled that the Appeal was moot, the trial court ruled on the merits and entered findings of fact and conclusions of law ("FFCL") and thereafter affirmed the final order by the Administrative court. CP 20-22. A motion for reconsideration was filed and requested that the Court strike any FFCL that addressed the merits of the case. CP 14-19. Additionally, counsel on behalf of Ms. Whittenburge, filed a motion to vacate the Order. CP 11-13. Both motions were denied. CP 1. Ms. Whittenburge timely appealed the Order on December 30, 2014 to this Court. At no time in the trial court did DSHS assert that standing was an issue. CP 2-6.

V. ARGUMENT

A. THIS COURT SHOULD NOT DISMISS THIS APPEAL AS MS. WHITTENBURGE IS AN AGGRIEVED PARTY AND HAS A RIGHT TO APPEAL THE SUPERIOR'S COURT RULING ON THE MERITS

The general rule, only an aggrieved party may seek review from an appellate court, that aggrieved party has a substantial interest in the subject matter of that which is before the court and is aggrieved or prejudiced by the judgment or order of the court. Some personal right or pecuniary interest must be affected. *Sheets v. Benevolent & Protective Order of Keglers*, 34 Wn.2d 851, 855, 210 P.2d 690, 692 (1949).

Here, as DSHS correctly pointed out "the aggrieved party would have been Ms. Whittenburge but she is deceased" Respondent's Motion, at 4. The Estate has filed a motion with this Court to substitute as a party. There is no intelligent dispute that the Personal Representative of the Estate has standing to bring this appeal as a matter of law. *E.g.* RCW 11.48.010.; because the trial court deemed the case moot but proceeded on the merits of the case. Thus, this Court should deny DSHS's motion to dismiss as the Estate of Concepcion Whittenburge is obviously aggrieved and prejudiced by the order and therefore has standing.

B. THE TRIAL COURT DID NOT HAVE JURISDICTION TO ENTER THE ORDER AND THUS DISMISSAL OF THIS APPEAL AT THIS POINT IS NOT PROPER.

DSHS also seeks to dismiss this appeal claiming the case is moot as there is no effective relief that can be granted. As is shown below, this is a misreading of the law.

Even though the Estate agrees with DSHS that the case was mooted upon Ms. Whittenburge's death (October 18, 2014), such agreement does not divest this Court of jurisdiction to address this appeal. *Mead Sch. Dist. v. Mead Education Ass'n*, 85 Wn.2d 278, 534 P.2d (1975) is instructive on the concept of jurisdiction. There, an appeal from an order of contempt was made claiming the trial court lacked jurisdiction. The Supreme Court stated:

> "The test of the jurisdiction of a court is whether or not it had power to enter upon the inquiry, not whether its conclusion in the course of it was right or wrong." *State v. Olsen*, 54 Wn.2d 272, 274, 340 P.2d 171 (1959), quoting 12 A.L.R.2d 1059, 1066 (1950).
>
> In most circumstances the application of this principle is relatively straightforward, and the distinction between errors of law and arrogations of power fairly easy to draw. Where it has not been courts have compounded it and fashioned the concept of "jurisdiction to determine jurisdiction." *United States v. United Mine Workers*, 330 U.S. 258, 91 L. Ed. 884, 67 S. Ct. 677 (1947); *United States v. Shipp*, 203 U.S. 563, 51 L. Ed. 319, 27 S. Ct. 165 (1906). These cases hold that a court's order must be obeyed if it had the power to decide

> whether it was authorized to issue it, even if it is later held that it was not so authorized. They are based on the fundamental premise that when a question of authority is raised, someone must decide it, and the initial decision is going to be made by the forum court itself.

85 Wn.2d at 280-281. Once the trial court decided that the case was moot because of Ms. Whittenburge's death, its jurisdiction ceased and it lacked the power to enter the FFCL. "A case is moot if a court can no longer provide effective relief." *Harbor Lands LP v. City of Blaine*, 146 Wn. App. 589, 592, 191 P.3d 1282 (2008). Mootness "is directed at the jurisdiction of the court" and may be raised at any time. *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845 (1983). This is because a case can become moot during the time it takes to reach the appellate court. *Hansen v. West Coast Wholesale Drug Co.,* 47 Wn.2d 825, 826-27, 289 P.2d 718 (1955). If a case is moot at the time the court enters judgment, that judgment must be vacated and dismissed as the trial court lacked the jurisdiction to enter the FFCL. *Harbor Lands LP*, 146 Wn. App. at 591. As such, this court has the jurisdiction to determine whether the trial court had jurisdiction to act on the merits of the underlying case once Ms. Whittenburge had passed away. Thus, while the underlying case

was mooted at Ms. Whittenburge's death, this court still has the jurisdiction to address trial court's actions on appeal.

When the trial court heard the case on November 3, 2014, it could no longer provide effective relief. Ms. Whittenburge's underlying complaint asked the court to require DSHS to pay for her IP of choice. Because Ms. Whittenburge passed away she was no longer in need of an IP. As in *Hansen*, the plaintiff's cause of action became moot while the appeal was pending, so it should have been dismissed. *Hansen*, 47 Wn.2d at 827.

In certain circumstances, a case with an issue that is moot as applied to the party, may still be decided under the public interest exception, but only if the following three factors are met: (1) the issue is public in nature; (2) a determination would provide future guidance to public officers; and (3) the issue is likely to recur. *Hart v. Dep't of Social & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988). DSHS concedes that "[t]he 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*." Motion, at 8. Additionally, DSHS states that it believes that Petitioner will argue an exception to a mootness case; however, this is disingenuous of

DSHS, as DSHS, knows that Ms. Whittenburge's attorney argued an exception to mootness but thereafter the trial court rejected the exception to the mootness argument and deemed the case moot. Motion at FN 1; CP 20. Even more, DSHS knew that Ms. Whittenburge agreed with the ruling of mootness and requested that the trial court reconsider its FFCL in light of the trial court's jurisdiction over the case once it deemed the case moot. Motion, at 3; CP 14-19; 11-13.

Here, the Order on Petition for Judicial Review does not mention any of the three factors and there is no indication the court considered them. The findings of fact upheld the sufficiency of the evidence, which is determined on a case by case basis and is certainly not a matter of public concern. Moreover, DSHS admits "no effective relief can be granted and that the case is moot." Motion, at 6. But, then goes on to state, "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." Motion, at 3. The trial court did not have personal jurisdiction over Ms.Whittenburge. Ms. Whittenburge's death relinquished the court's personal jurisdiction over her. Therefore, the court had no authority to adjudicate her claim. It necessarily

follows that it had no authority to enter a judgment and therefore had no authority to issue findings of fact and conclusions of law. CP 20-22.

The court has applied the public interest exception where "matters of continuing and substantial public interest are involved." *Sorensen v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). Because the purpose of the exception is to provide guidance for the future, it is logical that the court must make a factual determination on the record whether it considered the three essential factors. There is no evidence on the record that the court applied the public interest exception to the mootness doctrine. Therefore, the motion to dismiss must be denied because (1) this court has jurisdiction to address whether the Action became moot upon Ms. Whittenburge's death, and, (2) whether the FFCL were properly issued by the trial court.

VI. CONCLUSION

Ms. Whittenburge passed away, before the trial court entered any judgment. Upon her death, the trial court no longer had jurisdiction over her and, therefore, had no authority to adjudicate her claim. Moreover, once the trial court deemed her appeal moot it divested its jurisdiction over the subject matter as well.

Therefore, this Court should deny DSHS's attempt to circumvent well established law and deny the motion to dismiss.

Dated this 2nd day of March, 2015.

Guidance to Justice Law Firm, PLLC

By: Mary C. Anderson Digitally signed by Mary C. Anderson DN: cn=Mary C. Anderson, o=Guidance to Justice Law Firm, PLLC, ou, email=mary@guidancetojustice.com, c=US Date: 2015.03.02 09:15:09 -08'00'

Mary C. Anderson, WSBA 44137
Attorney for Appellant Concepcion Whittenburge

Certificate of Service

I, Mary C. Anderson, certify under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: On March 2, 2015, I caused the Response Brief to DSHS's Motion to Dismiss to be filed and served upon the Court of Appeals, Division I; and a copy via legal messenger to Respondent's attorney of record, Amanda M. Beard

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 2nd day of March, 2015

Mary C. Anderson Digitally signed by Mary C. Anderson DN: cn=Mary C. Anderson, o=Guidance to Justice Law Firm, PLLC, ou, email=mary@guidancetojustice.com, c=US Date: 2015.03.02 09:15:36 -08'00'

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