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NO. 52928-9-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Welfare of

T.P.,

A Minor Child.

**BRIEF OF RESPONDENT,
THE DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES**

ROBERT W. FERGUSON
Attorney General

JULIE A. TURLEY
Assistant Attorney General
WSBA #49474
Office of the Attorney General
1250 Pacific Avenue, Suite 105
PO Box 2317
Tacoma, WA 98401
(253) 593-5243
julie.turley@atg.wa.gov
OID #91117

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I. INTRODUCTION

In the course of a child dependency proceeding, and through counsel, D.P. voluntarily waived his shelter care hearing and agreed to an order of dependency establishing out-of-home placement for his child, T.P. Nonetheless, he now asks this Court to dismiss the dependency action entirely and order T.P. to be returned to his custody because the juvenile court did not complete the preliminary shelter care hearing within 72 hours of the child's initial removal from the home. But subsequent events in the dependency proceeding—including D.P.'s own request for a second continuance of the shelter care hearing, D.P.'s waiver of a shelter care hearing and agreement to out-of-home placement, D.P.'s agreement to an order establishing dependency, and T.P.'s subsequent return to her parents' care—unequivocally establish that reversal of the dependency action is inappropriate here. This Court should decline to dismiss the dependency petition and decline to order return of the child under these circumstances.

II. RESTATEMENT OF THE ISSUES

The juvenile court continued D.P.'s initial shelter care hearing for 12 court days due to lack of court resources. D.P. then requested a second continuance, delaying the shelter care hearing another 24 court days. Thereafter, D.P. waived his right to a shelter care hearing, agreed to out-of-home placement, and later agreed to an order of dependency that also

included out-of-home placement. These facts raise the following issue: If the juvenile court abused its discretion by continuing the initial shelter care hearing for 12 court days, is dismissal of the dependency petition an inappropriate remedy where D.P. later requested and received a second continuance, waived his right to a shelter care hearing, agreed to out-of-home placement, and agreed to an order of dependency?

III. RESTATEMENT OF THE CASE

A. Dependency Proceedings, Generally

A dependency proceeding is initiated by the filing of a petition and supporting declaration with the juvenile court alleging that a child is dependent and that the child's health, safety, and welfare will be seriously endangered if not taken into custody. RCW 13.34.050(1). A dependent child is any child who (1) has been abandoned, (2) is abused or neglected by someone legally responsible for caring for the child, or (3) has no parent, guardian, or custodian capable of adequately caring for the child. RCW 13.34.030(6). Typically, the Department of Children, Youth, and Families (Department) obtains custody with a judge-signed order following a motion it files with its dependency petition. RCW 13.34.050; *See* CP at 1-12. If so, the petition must allege facts evidencing risk of imminent harm were the child to remain in the parent's custody. RCW 13.34.050. However, filing a dependency petition does not necessarily lead to a child's

removal. The Department may, and often does, file dependency petitions without also asking the juvenile court for permission to remove the child. *Compare* RCW 13.34.040 *and* RCW 13.34.050.

When a child is removed, the juvenile court must then hold a shelter care hearing within 72 hours of removal, excluding weekends and holidays. RCW 13.34.065(1)(a). A shelter care hearing is an emergency proceeding at the outset of a dependency case after a child is removed from a parent's care. RCW 13.34.060(1), .065(1)(a). The primary issue at a shelter care hearing is the child's placement pending adjudication of the dependency petition. RCW 13.34.060(2), .065(1)(a). All parties have a right to present testimony on this issue. RCW 13.34.065(2)(b). The juvenile court may place a child with a parent if it is safe to do so, with a relative, with another suitable placement, or in licensed care. RCW 13.34.065(5). In addition to the child's need for shelter care, the juvenile court must also gather evidence and complete tasks related to 11 enumerated topics, including notice to the parents, services provided to prevent removal, and appointment of a guardian ad litem. RCW 13.34.065(4). When a parent cannot attend a shelter care hearing for good cause, they may request another hearing. RCW 13.34.065(1)(b). A court order for continued shelter care is required before a child may be held longer than 72 hours, excluding weekends and holidays. RCW 13.34.060(1).

A parent may waive their right to a shelter care hearing by agreeing to a shelter care order. RCW 13.34.065(3). The parent may also waive their right to a fact-finding hearing on the dependency petition by agreeing to an order of dependency and disposition, which includes placement of the child during the case. RCW 13.34.110(3)(a). The juvenile court then reviews the dependency every six months until the court orders the child returned home or the parties implement another permanent plan. RCW 13.34.136(1).138(1).

B. Dependency of T.P.

On December 11, 2018, the Department filed a dependency petition regarding T.P. Clerk's Papers (CP) at 1. D.P., the appellant, is T.P.'s father. CP at 1. The Department alleged that T.P. was a dependent child pursuant to RCW 13.34.030(6)(c). CP at 2. Specifically, the petition alleged that both parents engaged in substance abuse. T.P.'s mother was allegedly using methamphetamine and D.P. was consuming alcohol and smoking marijuana, which negatively interacted with his prescribed medication for his seizure disorder. CP at 2-5. Both parents also struggled with mental health issues and domestic violence between them. CP at 2-5. The condition of the home was unsafe for a small child. CP at 2-5. T.P is three years old with medical needs and she had missed several recent medical

appointments. CP at 3. Prior to filing the dependency petition, the Department offered the parents services to no avail. CP at 3, 5.

A court commissioner reviewed the dependency petition and, on December 11, 2018, signed an order placing T.P in the Department's custody. CP at 10-11. The court found that "it is currently contrary to the child's welfare for the child to remain at home. The petition and/or supporting declarations . . . establish reasonable grounds to believe that the child is dependent and that, if the child is not taken into custody, the child's health, safety, and welfare will be seriously endangered." CP at 10.

A shelter care hearing was set for two days later, December 13, 2018. CP at 7. Both parents appeared at the hearing and courtesy counsel represented them. Report of Proceedings (Dec. 13, 2018) (RP) at 1. The juvenile court and the parties discussed some, but not all, of the topics required by RCW 13.34.065(4). Each parent requested appointed counsel and the court granted their requests. RP at 1, 3. The court also learned that T.P. was in relative care and the parties discussed the parents' visitation schedule. RP at 4; CP at 37. The Department requested a hair follicle test of T.P., and provided an update regarding T.P.'s well-being. RP at 2-3; CP at 36. The court also inquired into the child's ancestry to determine whether the Indian Child Welfare Act (ICWA) applies to this case. RP at 6-8. The court also appointed a guardian ad litem for T.P. CP at 38, 95.

Finally, the court concluded that it remained “contrary to the welfare of the child to remain in the child’s home,” that there were “reasonable grounds to believe the child [was] dependent and the child’s health, safety, and welfare [would] be seriously endangered if not taken into custody,” that “there [was] a risk of imminent harm to the child in the child’s home,” and the Department had made “reasonable efforts to prevent or eliminate the need for removal of the child from the child’s home.” CP at 38. *See generally* RCW 13.34.065(4) (delineating issues to discuss at shelter care hearings).

D.P. requested a contested hearing, although the record does not specify his point of contention. RP at 5. D.P. objected to continuing the hearing beyond 72 hours when the court informed him that the soonest available date was January 2, 2019. RP at 4-5. The court verified that there was no availability before then, and continued the shelter care hearing for 12 court days. RP at 6. The court explained that no other courtrooms were available. RP at 6.

On January 2, 2019, D.P. requested a second continuance because his attorney was not available. CP at 46. All parties agreed to set the contested shelter care hearing on February 6, 2019. CP at 46. However, on January 29, 2019, D.P. knowingly, intelligently, and through counsel waived the shelter care hearing and agreed to a shelter care order that maintained T.P. in out-of-home care, placed with a relative, because it was

contrary to her welfare to remain in D.P.'s home. CP at 107, 109-10. On February 20, 2019, D.P. agreed to an order of dependency that specified that it is "contrary to the child's welfare to return home," and again maintained T.P. in out of home placement.¹ CP at 121, 126.

D.P. sought discretionary review of the December 13 continuance order. CP at 64. This Court's Commissioner granted review.

IV. ARGUMENT

The primary purpose of a shelter care hearing is to determine whether the safety of the child warrants continued removal from her parents' care while a dependency proceeding is pending. RCW 13.34.065. Here, D.P. was not provided with the opportunity to present testimony to the juvenile court regarding the need or lack of need for continued shelter care for T.P. within 72 hours of T.P.'s removal as required by RCW 13.34.065. Nonetheless, D.P. later agreed to a second continuance, waived his right to a shelter care hearing entirely, and agreed to an order mandating continued placement of T.P. outside of the home. In so agreeing, D.P. conceded that it was contrary to T.P.'s welfare to return home, that T.P. had no parent to provide her with supervision or care, and that release of T.P. from shelter care would present a serious threat of substantial harm

¹ T.P. was placed with relatives. CP at 142; RP at 2. The child returned to her parents' care on June 20, 2019, per court order on the Department's motion. *See* Supp. CP.

to her. He subsequently agreed to an order of dependency, where he again agreed that T.P. had no parent capable of adequately caring for her, and she could not be safely returned to the home at that time. As part of the normal course of the dependency action, the juvenile court later returned T.P. to her parents' care. Thus, any error in delaying the initial date of the shelter care hearing was mitigated by subsequent events. This Court should dismiss this appeal as moot and decline to order D.P.'s requested remedy of dismissal of the dependency petition and return of the child to a home that D.P. himself previously agreed was unsafe.

A. The Child's Best Interests Govern Dependency Proceedings

The overarching principle in dependency proceedings is the best interests of the child. Whenever the child's right to basic nurture, physical and mental health, and safety conflict with the parents' legal rights, the child's rights prevail. RCW 13.34.020. "It is well established that when a child's physical or mental health is seriously jeopardized by parental deficiencies, 'the State has a *parens patriae* right and responsibility to intervene to protect the child.'" *In re Dependency of Schermer*, 161 Wn.2d 927, 941, 169 P.3d 452 (2007) (quoting *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980)). The law permits such intervention in a dependency case, which is a remedial proceeding designed

to protect children, help parents alleviate problems that lead to the finding of dependency, and reunite families. *Id.* at 942-43.

B. To the Extent the Continuance of the Initial Shelter Care Hearing was Erroneous, its Impact was Limited, and Should Not Result in Dismissal of the Dependency

The Department agrees that the juvenile court did not hold a shelter care hearing within 72 hours, as required by the statute. RCW 13.34.065(1)(a). However, as this Court's Commissioner correctly concluded, this case is moot. T.P. is a dependent child, D.P. independently agreed to T.P.'s placement outside of the home, and T.P. returned home per court order on June 20, 2019. Thus, there is no remedy that would address the original delay in the shelter care hearing. Citing no authority, D.P. asks this Court to dismiss the dependency petition—despite his agreed dependency order—and order the trial court to return the child home. Br. of Appellant at 10, 13. These remedies are not appropriate.

A case is moot where appellate review can no longer provide the parties with effective relief. *In re Dependency of H.*, 71 Wn. App. 524, 527, 859 P.2d 1258 (1993) (citing *In re Detention of Swanson*, 115 Wn.2d 21, 24, 793 P.2d 962, 804 P.2d 1 (1990)). Where an appellant presents only

moot questions, the appeal should be dismissed. *Id.* Shelter care issues become moot after the juvenile court enters orders of dependency.² *Id.*

Here, D.P. agreed to a shelter care order specifically agreeing that T.P. should be placed outside of the home, and T.P. became dependent when D.P. agreed to an order of dependency. CP at 107, 121. Further, T.P. returned home to her parents' care on June 20, 2019, per court order on the Department's motion. *See* Supp. CP. All of these facts make this case moot, and case law does not provide D.P. a cure for the juvenile court's statutory error. *In re Dependency of H.*, 71 Wn. App. at 527.

Appellate courts have addressed procedural issues in shelter care hearings four times. *In re Dependency of H.*, 71 Wn. App. 524; *In re Dependency of H.W.*, 70 Wn. App. 552, 854 P.2d 1100 (1993); *In re Welfare of B.D.F.*, 126 Wn. App. 562, 109 P.3d 464 (2005); *In re Dependency of R.L.*, 123 Wn. App. 215, 98 P.3d 75 (2004). None of these cases support D.P.'s requested remedy of dismissing the dependency petition.

In re Dependency of H. is instructive. In that case, Division One of this Court held that the juvenile court made insufficient findings to support

² An appellate court may review a moot case if it presents an issue of substantial public interest capable of evading review. *In re Dependency of H.*, 71 Wn. App. at 527. D.P.'s counsel on December 13 stated he had "explained the normal court practice of setting out a few weeks, but [D.P. is] requesting that this contested hearing happen today." RP at 5. This statement is not evidence of usual court procedure because nothing suggests that the court's "practice" includes continuing shelter care hearings even if the parent objects to the continuance. The record shows that the court did not have availability for a contested hearing on that day for this case.

the shelter care order. *In re Dependency of H.*, 70 Wn. App. at 530. The juvenile court also erroneously denied the parent an opportunity to present evidence. *Id.* However, the appellate court did not reverse because dependency of the child had already been established. *Id.* In other words, reversing the shelter care order would have had no impact on the ongoing facts of the dependency proceedings.

In this case, D.P. agreed to out-of-home placement in his agreed shelter care order. CP at 107, 109-10. T.P. is already a dependent child per D.P.'s agreed dependency order providing for out-of-home placement. CP at 121, 126. And the child returned to her parents' care in June 2019. Supp. CP. Reversal of the dependency petition is thus contrary to D.P.'s demonstrated position below and contrary to precedent because dependency was established. *In re Dependency of H.*, 70 Wn. App. at 530-31.

Moreover, the Department's petition for dependency and the child's placement pending adjudication of that petition are two distinct events. The Department's filing of a dependency petition does not necessarily lead to removal of the child from the home. The Department may file a petition without also asking the juvenile court for an ex parte order removing the child. *Compare* RCW 13.34.040 *and* RCW 13.34.050. Thus, even if the agreed shelter care order was at issue in this appeal and this Court decided to reverse that order, the result, at most, would be placement in D.P.'s

custody—not dismissal of the dependency petition. But that is not an appropriate remedy where D.P. has since independently agreed that the child should be placed out-of-home and the child thereafter returned to D.P.’s care through the ordinary course of the dependency action.

In some instances where a timely shelter care hearing is not provided, remand to the juvenile court for further proceedings might be appropriate. Case law provides that when a juvenile court does not support out-of-home placement with appropriate findings, the remedy is to return for further proceedings. *See In re Dependency of A.Z.B.*, No. 49737-9-II, 2017 WL 4786996, at *12 (Wash. Ct. App. Oct. 24, 2017) (unpublished) (reversing juvenile court’s out-of-home placement order and remanding for further proceedings); *In re Welfare of A.L.C.*, 8 Wn. App. 2d 864, 877, 439 P.3d 694 (2019) (Department failed to provide active efforts under the ICWA; remedy was to return the child or for the juvenile court to make additional findings). But here, D.P. has since waived his right to a shelter care hearing, agreed to out-of-home placement, and, in fact, agreed to a dependency, which has already resulted in T.P.’s placement with her parents. Remanding to the juvenile court for further proceedings is unnecessary.

Error without prejudice to the ultimate outcome of the case is no basis for reversal. *In re Welfare of McGee*, 36 Wn. App. 660, 663,

679 P.2d 933 (1984). Both statutory and procedural due process errors are subject to harmless error analysis. *In re Dependency of A.W.*, 53 Wn. App. 22, 27, 765 P.2d 307 (1988). Even a termination of parental rights order may be affirmed if “the outcome here would have been the same.” *In re Dependency of K.N.J.*, 171 Wn.2d 568, 584, 257 P.3d 522 (2011) (while dependency order was invalidly entered, order of termination necessarily included finding of dependency and alleviated prejudice).

The basis of D.P.’s claim of error is a statutory provision requiring a shelter care hearing within 72 hours. RCW 13.34.065(1)(a). But any error in the court’s basis for continuing the hearing was diluted when D.P. agreed to a second continuance on January 2. CP at 46. The error was alleviated even further on January 29, when D.P. entered an agreed shelter care order that placed T.P. out-of-home. CP at 107, 109-10. Again, on February 20, he entered an agreed order of dependency that again maintained T.P. in out-of-home placement. CP at 121, 126. The juvenile court thus provided D.P. with multiple opportunities to be heard on the issue of placement but D.P. declined to take advantage of those opportunities. T.P. has since returned to her parents’ care, one of the remedies D.P. asks for in this appeal. Supp. CP. Because the juvenile court’s first continuance order has no further impact on this dependency, this Court should affirm.

C. This Court Should Decline to Consider D.P.’s Constitutional Argument.

This Court should not consider D.P.’s argument that the juvenile court violated his constitutional due process rights for three reasons. Br. of Appellant at 1, 9. First, this Court can decide this matter on statutory grounds, and should therefore decline to entertain D.P.’s constitutional argument. Second, D.P. does not properly raise a constitutional due process challenge, thus, this Court should decline to address that argument. Third, if this Court considers D.P.’s constitutional challenge, the continuance here did not violate D.P.’s constitutional rights.

D.P. argues that the juvenile court violated his constitutional rights by continuing the shelter care hearing that is required by state law to occur within 72 hours of T.P.’s removal from her parents’ care. RCW 13.34.065(1)(a). This Court reviews a decision about whether to continue a hearing for manifest abuse of discretion. *In re Welfare of R.H.*, 176 Wn. App. 419, 424, 309 P.3d 620 (2013). The court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.*

Because this matter can be resolved on statutory grounds, this Court should decline to consider the constitutional challenge raised by D.P. Where an alleged error can be resolved on statutory grounds, an appellate

court need not analyze constitutional issues. *Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000). The appellate court “should decline to consider the constitutional issues” in favor of non-constitutional resolution. *HJS Dev., Inc. v. Pierce Co.*, 148 Wn.2d 451, 469 n.75, 61 P.3d 1141 (2003). The Department acknowledges that D.P. did not receive a full shelter care hearing within 72 hours of T.P.’s removal from his care, as required by statute. This case, then, can be resolved on statutory grounds, and this Court should not reach D.P.’s constitutional arguments.

If, however, this Court considers D.P.’s claim that the juvenile court violated his due process rights by continuing the shelter care hearing, this argument fails because D.P. did not adequately support his due process challenge. Despite D.P.’s general reference to violation of his constitutional due process rights, he does not conduct a *Mathews v. Eldridge* analysis, or otherwise cite that decision. Thus, he has not informed the court as to why the process he received here was constitutionally inadequate. To the extent D.P. asserts a due process argument, this Court should decline to consider it. *See Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (“We will not consider an inadequately briefed argument.”).

If the Court considers D.P.’s inadequately briefed due process argument, the scope of an individual’s procedural due process rights is

determined by balancing the private interests affected by the procedure requested, the risk of error in requiring the procedure, and the government's interest in the procedure. *Santosky v. Kramer*, 455 U.S. 745, 754, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L.Ed.2d 18 (1976)). Here, while a parent's private interest in custody of their child is great, the continuance order here resulted in a temporary—not permanent—deprivation that the court considered again 12 court days later. The risk of error in continuing the shelter care hearing was low because D.P. received a later opportunity to challenge out-of-home placement of T.P. on January 2.³ The risk of error in continuing the hearing was also lower because the shelter care statute provided D.P. a number of procedural safeguards, including that the juvenile court had reviewed the Department's dependency petition ex parte and found that D.P. was at risk of imminent harm necessitating removal from her parents. CP at 10-11; RCW 13.34.050(1). Finally, with regard to

³ D.P. boldly pits the Department's position in this appeal against Attorney General Bob Ferguson's statement on the federal government's practice of routinely separating migrant children from their families at the United States-Mexico border. Br. of Appellant at 11-12. D.P. creates a conflict where none exists. Here, the Department removed D.P. from her parents' care after the court ordered the removal of the child based on the allegations in the dependency petition indicating the parents were not capable of parenting her such that the child's health or well-being was at substantial risk of harm. CP at 2, 10-11; RCW 13.34.050. No such allegation of abuse or neglect or any judicial process whatsoever exists in the federal government's family separation policy at the border. Complaint for Declaratory and Injunctive Relief at 54-55, 115, 119, *Wash. v. United States*, No. 2:18-cv-00939-MJP (June 6, 2018).

the government's interest in a shelter care hearing, the government has a *parens patriae* interest in protecting child safety, such that when a child's right to safety is balanced with the parent's procedural rights, the child's rights prevail. *See* RCW 13.34.020. On balance, the interests and risk of error do not give rise to a due process violation arising from the juvenile court's continuance order.

This balancing of the *Mathews* factors is underscored by the fact that when he had a chance to challenge out-of-home placement of T.P. in January, D.P. ultimately agreed to her removal. After the continuance on December 13, D.P. had an opportunity to be heard on January 2, 2019, and he did not exercise that opportunity. CP at 46. He later agreed to a shelter care order, waiving altogether his right to contest out-of-home placement of T.P. pending adjudication of the dependency petition. CP at 107.

Finally, D.P.'s comparison to the speedy trial right in criminal cases, Br. of Appellant at 6-7, is inapposite because the speedy trial right derives from criminal law that does not apply here. In criminal cases a person's physical liberty may be curtailed by being incarcerated; here, D.P.'s physical liberty was not at issue. The appellate court views child welfare cases, even a termination of parental rights proceeding that results in a permanent deprivation, as distinct from the "highly consequential decisions" in criminal cases. *In re Adoption of M.S.M.-P*, 184 Wn.2d 496,

500, 358 P.3d 1163 (2015). And orders issued during shelter care proceedings are less intrusive on parental rights than dependency trials or more severe termination of parental rights trials. *In re Dependency of H.W.*, 70 Wn. App. at 556. The speedy trial right in criminal cases is simply not applicable here.

This Court should resolve this case on statutory grounds, and should decline to consider D.P.'s inadequate constitutional challenge to the juvenile court's continuance order. If this Court does consider the constitutional challenge, the continuance here did not violate D.P.'s due process rights.

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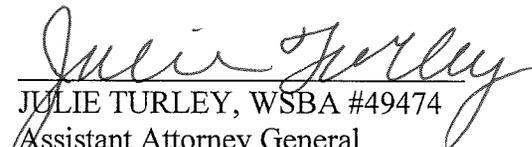
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V. CONCLUSION

Neither of the remedies requested by D.P.—dismissal of the dependency petition or return of the child to the home—are available here, where D.P. himself agreed that there was no parent capable of caring for T.P., it was contrary to T.P.’s welfare to return home, and T.P. has already returned home in the dependency case. This Court should either affirm the continuance order or dismiss the appeal as moot.

RESPECTFULLY SUBMITTED this 4th day of September, 2019.

ROBERT W. FERGUSON
Attorney General



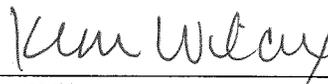
JULIE TURLEY, WSBA #49474
Assistant Attorney General

DECLARATION OF SERVICE

I, Kim Wilcox, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

On September 4, 2019, I caused a true and correct copy of the Brief of Respondent to be filed electronically with the Court of Appeals, Division II, and to be electronically filed and served on the parties via email through the Court's electronic filing system.

SIGNED in Tacoma, Washington, this 4th day of September, 2019.



Kim Wilcox
Legal Assistant

ATTORNEY GENERAL OF WASHINGTON - TACOMA SHS

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Appellate Court Case Title: In re the Welfare of T.P.
Superior Court Case Number: 18-7-02402-5

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