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Supreme Court No. 80570

Court of Appeals No. 273946 III

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SUPREME COURT
OF THE STATE OF WASHINGTON

In Re the Dependency of D.R. and A.R.

State of Washington

v.

T.R.

CHILDREN'S JOINT REPLY ON
MOTION FOR DISCRETIONARY REVIEW

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I. ARGUMENT

A. Introduction

The State seeks to place an unprecedented limit on the application of the substantial public interest doctrine—a doctrine that exists to give appellate courts authority to rule on issues for which the courts would have otherwise lost jurisdiction. The State ignores case law that indicates that the manner in which a court loses jurisdiction is immaterial to the application of the doctrine, and the State offers no authority suggesting such a limitation. Additionally, because the statute in question does not provide an absolute right to counsel for all children in dependency and termination proceedings, it was appropriate for the Court of Appeals, and it is appropriate for this Court, to consider the constitutional question at issue.

In this case, the Court of Appeals had ample authority under court rules and case law to vacate the termination, issue a partial remand, and retain jurisdiction over the constitutional question presented by the Children—something the Commissioner’s Ruling and the State suggest is impermissible.

B. Courts Can Use and Have Used the Substantial Public Interest Doctrine to Retain Jurisdiction Regardless of the Manner in Which Jurisdiction Was Lost.

The State creates an unsubstantiated distinction between “moot” cases—in which the substantial public interest doctrine can be used—and “decided” cases—in which it supposedly cannot. According to the State, a moot case is one where jurisdiction is lost through its own “procedural accord,” i.e. an event other than an appellate court’s ruling. By contrast, a “decided” case is one where an appellate court’s ruling provides effective relief to the appellant, thus generally divesting the court of jurisdiction.¹

The Children agree with the State that these are two ways in which a court may lose jurisdiction. However, there is no authority (and the State cites none) indicating that courts distinguish between “decided” and “moot” cases when applying the substantial public interest doctrine.² On the contrary, appellate courts have relied on the substantial public interest doctrine in both situations—when an issue becomes moot by procedural

¹ The test for mootness is simply whether the court can no longer provide effective relief to the parties before it. *In re LaBelle*, 107 Wn.2d 196, 200, 728 P.2d 138 (1986). Generally, cases presenting moot issues on appeal are dismissed. *State v. G.A.H.*, 133 Wn. App. 567, 573, 137 P.3d 66 (2006). However, a court may address a moot issue if “matters of continuing and substantial public interest are involved.” *Id.* (quoting *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). Both situations presented by the State in which an appellate court loses jurisdiction fall within this definition of mootness.

² In fact, the State provides absolutely no authority that the concept of a “decided” case has been recognized for any purpose whatsoever.

accord and when a court's ruling provides effective relief to the appellant. Applying the doctrine in either type of case is consistent with the purpose of the doctrine.

In fact, earlier this year, Division III relied on the doctrine to rule on the legality of a court fee *after ruling* that the Petitioner should be absolved of all fees (thus mooting the fee issue). *In re Brady*, 154 Wn. App. 189, 198-99, 224 P.3d 842 (2010) (“We choose to reach this first impression issue even though Mr. Brady will be absolved of his financial obligations.” (emphasis added)). In other words, Division III chose to rule on an issue rendered moot by its own decision—something that both the Commissioner’s Ruling and the State suggest is not permitted.

If the State’s theory was correct, the use of the substantial public interest doctrine in *Brady*, as well as a number of other “decided” cases, would have been prohibited. *See id.*; *State v. Sansone*, 127 Wn. App. 630, 634-643, 111 P.3d 1251 (2005) (where state’s concession mooted appellant’s facial and as applied challenges to sentencing conditions, court accepted concession but retained jurisdiction over facial challenge under substantial public interest doctrine); *City of Seattle v. Johnson*, 58 Wn. App. 64, 66-67, 791 P.2d 266 (1990) (although city’s concession mooted appellant’s as applied challenge to city ordinance, court retained

jurisdiction on facial constitutional issue under substantial public interest doctrine).

Ignoring these cases, the State, without analysis, relies on three appellate cases for the proposition that “Washington appellate courts lose jurisdiction to take any action on a case upon entry of an order terminating review, which includes orders of reversal and remand.” *State’s Answer* at 5-6 citing *Reeploeg v. Jensen*, 81 Wn. 2d 541, 546, 47 P.3d 60 (2002); *State v. McDermond*, 112 Wn. App. 239, 251, 47 P.3d 600 (2002); *Hong v. Dep’t of Soc. & Health Svcs.*, 146 Wn. App. 698, 709, 192 P.3d 21 (2008). These cases are inapposite, as not one of them involved retention of jurisdiction under the substantial public interest doctrine.

Reeploeg was simply a case of *res judicata*. There, the Washington Supreme Court found the Court of Appeals lacked jurisdiction to modify an order of dismissal after timely appeal of that order had been previously heard and rejected by the Supreme Court. *Reeploeg*, 81 Wn.2d. at 549. *McDermond* was simply an application of RAP 12.3. There, the appellate court remanded for a determination whether erroneous advice affected a challenged plea. *McDermond*, 112 Wn. App. at 250. If the trial court found the advice actually and materially affected the plea, the case was to proceed to trial. *Id.* at 250-51. Finding nothing more to decide, the court terminated review. *Id.* at 251.

As shown by *Hong*, not only do these cases not address the issues at bar, neither can be read to mean that a court automatically loses jurisdiction upon remand. In *Hong*, the plaintiff filed an appeal challenging the findings of an administrative law judge, and the appellate court remanded for supplemental evidence and further proceedings. *Hong*, 146 Wn. App. at 701-02. Subsequently, the plaintiff requested further judicial review. *Id.* at 702. Relying on *Pierce County Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983), which in turn relied on *Reeploeg*, the State, as here, argued the remand order automatically terminated appellate jurisdiction. *Id.* at 708. The court disagreed.

. . . *Pierce County Sheriff* cannot be read to say that the court automatically loses jurisdiction over a case when it remands for further proceedings. In *Pierce County Sheriff*, the court lost jurisdiction only because it ‘had already decided the issues presented by the Sheriff’s writ of review’ when it remanded to the commission. . . . Had the first order been interlocutory rather than final, the court would not have lost jurisdiction.

Id. at 710.³

³ In this case, the Commissioner cites to this same passage in her ruling, apparently to support her holding that the court does not have authority to issue an interlocutory order: “...if the motion for reversal and remand is granted, this decision will be final and not interlocutory in this matter, and this Court will no longer have jurisdiction to render a decision on the matter.” Commissioner’s Ruling at 1-2 n.1. However, *Hong* expressly allows an appellate court to retain jurisdiction by issuing an interlocutory order. 146 Wn. App. at 710. *See also Parmelee v. O’Neel*, No. 82128-3, 2010 WL 1077897, at *5 (Wash. March 25, 2010) (Supreme Court bifurcates case by remand to court of appeals for determination of attorney’s fees and remand to superior court for trial on remaining issues.)

As these cases show, appellate courts may enter final orders terminating review or interlocutory orders—orders which do not terminate review. RAP 12.3(a),(b). Under RAP 12.2, appellate courts “may take ‘any’ action required by the ‘interests of justice’” or “choose to disregard RAPs if the interests of justice require.” *State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903 (2005). These rules provide substantial authority to courts to retain jurisdiction of the constitutional question under the circumstances here.

As the Children have previously argued, the substantial public interest doctrine *presumes* that, without its use, the court would otherwise lose jurisdiction. The policy and rationale behind the doctrine is to permit courts, despite a loss of jurisdiction, to resolve issues of significant public interest that are likely to recur but evade review. This rationale exists regardless of *how* a court loses jurisdiction—whether through an external event (such as a litigant’s death or completion of a criminal sentence), dismissal of an underlying case,⁴ a party’s concession, or a party’s concession followed by a court’s decision. In each of these situations, the

⁴ *See, e.g., In re B.D.F.*, 126 Wn. App. 562, 570, 109 P.3d 464 (2005) (court retains jurisdiction to decide whether Guardian ad Litem had authority to bring shelter care hearing despite dismissal of underlying dependencies and State’s concession after filing of appeal). In *B.D.F.*, the court retained jurisdiction under the same rationale argued here—the ruling concerns significant matters of public interests by asserting legal conclusions regarding jurisdiction and standing impacting all Washington dependencies.

doctrine is designed to clarify issues of substantial public interest for lower courts, for government, and for individuals, given that the issue will recur and may evade review.⁵

In fact, in arguing that this Court “should leave the constitutional issue raised by the children for another day,” the State admits the issue not only evades review now, but will recur. *State’s Answer* at 10. In asking this Court to delay review, the State supports the Children’s argument that this is a matter of continuing and substantial public interest that this Court must answer now. Yet, it will be difficult for this issue to reach the appellate courts again, given that most dependent children do not have attorneys to raise this issue, and those that do have attorneys will not have standing to do so. The Court of Appeals ruling also renders future review even less likely by granting the State unfettered discretion to prevent review through concession. Delaying review denies justice for the thousands of abused and neglected children who interact with our state’s dependency system every year.⁶

⁵ The only distinction between the majority of the cases in which the substantial public interest doctrine was applied and cases cited by the Children is that, in the case at bar, full briefing had not yet been submitted. This is solely because the State did not submit a timely response when it submitted its concession—it requested, but never received an extension of time to do so. *Motion for Order Extending Time to File Respondent’s Reply Brief* (July 1, 2009). This is not a meaningful difference, as the Court can and should request briefing to be completed.

⁶ The amicus brief submitted by The Mockingbird Society noted that there are “between 10,000 and 14,000 [children in foster care] in Washington.” Brief for The Mockingbird

C. Because RCW 13.34.100 Does Not Provide an Absolute Right to Counsel for All Dependent Children, It Is Appropriate for This Court to Consider the Constitutional Basis For Such a Right.

As the Children argued below, while reversal of the termination and appointment of counsel for D.R. and A.R. will, for now,⁷ resolve *their* case on non-constitutional grounds, the right to counsel for *all* dependent children cannot be resolved on statutory grounds. Yet, ignoring the rationale underlying the substantial public interest doctrine, the State argues that courts “will not decide an issue on constitutional grounds when that issue can be resolved on other grounds.” *State’s Answer* at 9.

The cases relied upon by the State are inapposite. In each, *the right in question was already guaranteed by an existing statute.*⁸ Here,

Society as Amicus Curiae Supporting the Children at 11, *In re the Dependency of D.R. and A.R.*, State of Washington v. T.R. (No. 80513-0).

⁷ Given the discretionary statute, if D.R. and A.R.’s dependency is dismissed and later refiled, as frequently happens to foster youth whose “permanent” placements disrupt, they will find themselves in the same situation as they were before—in a complicated dependency matter, with no guarantee of access to legal counsel, and even more disrupted by a system meant to protect them. Because this is a possible outcome for both children, the Court should resolve the issue now.

⁸ *Washington State Coalition for the Homeless v. Dep’t of Soc. & Health Servs.*, 133 Wn.2d 894, 900, 932, 949 P.2d 1291 (1997) (emphasis added) (finding it unnecessary to decide whether State has constitutional duty to provide housing to homeless families whose children are in foster care due to inadequate housing, where “*state statute requires* the court to find reasonable efforts have been made to reunite the child with his or her family or to prevent removal of the child from the family... and *because the statute requires* the court to develop a program for the child that will least interfere with family autonomy,...”); *In re Dependency of Grove*, 127 Wn.2d 221, 233, 897 P.2d 1252 (1995)

there is no statutory right to counsel for any dependent child in Washington State under RCW 13.34.100(6). The State did not concede that D.R. and A.R. have a *statutory right* to legal representation, only that the trial court abused its discretion in declining to provide counsel.⁹

The State also argues that “[a] reviewing court is *not required* to exhaustively address all arguments and theories.” *State’s Answer* at 4 (emphasis added). The Children do not dispute this assertion. But it does not change the longstanding principle that a court may answer questions involving issues of continuing substantial public interest, regardless of, and in fact *only when* the case has been resolved on other grounds. The substantial public interest doctrine allows courts to address alternate legal theories even when one party has prevailed—precisely because the alternative legal theory may affect many other potential litigants.

(emphasis added) (“we hold that indigent civil litigants who have a *statutory right to counsel* at all stages of the proceeding have a right to counsel on an appeal of right. These litigants need not prove a constitutional right to appeal at public expense nor prove the probable merit of their claims in order to appeal at public expense.”); *In re Welfare of G.E.*, 116 Wn. App. 326, 332, 65 P.3d 1219 (2003) (emphasis added) (finding that the court needed not consider parents’ constitutional right to counsel because parents have a statutory right to counsel in child dependency proceedings, including parental rights termination proceedings).

⁹ See House Bill 2735 (2010) (Legislature unanimously finds that “inconsistent practices in and among counties in Washington have resulted in few children being notified of their right to request legal counsel in their dependency and termination proceedings.” H.B. 2735, 61st Leg., 2010 Regular Sess. (Wash. 2010).

II. CONCLUSION

As the Children have argued, the scope of the substantial public interest doctrine is, itself, an issue of substantial public interest. The Court of Appeals' decision, which sets forth an unprecedented restriction on the use of the doctrine, should be reviewed by this Court. Similarly, the constitutional issue is ripe for review and necessary to provide direction to the lower courts and redress for the thousands of children in foster care who lack counsel.

Respectfully submitted March 26, 2010,



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CERTIFICATE OF SERVICE

I declare under penalty of perjury and the laws of the State of Washington that the following statements are true:

1. On March 26, 2010, I caused to be served a true and correct copy of the Children's Joint Reply on Motion for Discretionary Review, by sending it via office e-mail with copy receipt to the following:

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