

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

10 JAN 27 AM 9:35

BY RONALD R. CARPENTER

CLERK *bjh*

Supreme Court No. 84132-2

Court of Appeals No. 273946-III

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 MOTION FOR DISCRETIONARY REVIEW

---

Casey Trupin, WSBA 29287  
Erin Shea McCann, WSBA 39418  
Attorneys for D.R.

Bonne W. Beavers, WSBA 32765  
Attorney for A.R.

Columbia Legal Services  
101 Yesler Way, Ste. 300  
Seattle, WA 98104

Center for Justice  
35 W Main Ave Ste 300  
Spokane, WA 99201-0119

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

A. IDENTITY OF PETITIONER.....1

B. COURT OF APPEALS’ DECISION.....1

C. ISSUES PRESENTED FOR REVIEW.....1

D. STATEMENT OF THE CASE.....2

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....7

    1. THE COURT OF APPEALS’ UNPRECEDENTED  
    LIMITATION OF ITS JURISDICTION TO CONSIDER  
    AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST IS  
    ITSELF AN ISSUE OF SUBSTANTIAL PUBLIC  
    INTEREST..... 8

    2. CHILDREN’S RIGHT TO COUNSEL IN DEPENDENCY  
    AND TERMINATION PROCEEDINGS INVOLVES A  
    SIGNIFICANT QUESTION OF LAW UNDER THE  
    FEDERAL AND STATE CONSTITUTIONS.....12

    3. CHILDREN’S RIGHT TO COUNSEL IN DEPENDENCY  
    AND TERMINATION PROCEEDINGS INVOLVES AN  
    ISSUE OF SUBSTANTIAL PUBLIC INTEREST.....14

F. CONCLUSION.....17

## TABLE OF AUTHORITIES

### Cases

<i>Braam v. State of Washington</i> , 150 Wn.2d 689, 81 P.3d 851 (2003).....	13
<i>City of Seattle v. Johnson</i> , 58 Wn. App. 64, 791 P.2d 266 (1990).....	9
<i>City of Yakima v. Mollett</i> , 115 Wn. App. 604, 63 P.3d 177 (2003).....	16
<i>Goss v. Lopez</i> , 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).....	13
<i>Hong v. Dep't of Soc. And Health Servs.</i> , 146 Wn. App. 698, 192 P.3d 21 (2008).....	10, 11
<i>In re C.R.B.</i> , 62 Wn. App. 608, 814 P.2d 1197 (1991).....	13
<i>In re Custody of Shields</i> , 157 Wn.2d 126, 136 P.3d 117 (2000).....	13
<i>In re Dependency of A.K.</i> , 162 Wn.2d 632, 174 P.3d 11 (2007).....	8, 15
<i>In re Dependency of H.</i> , 71 Wn. App. 524, 859 P.2d 1258 (1993).....	14
<i>In re Det. Of Kistenmacher</i> , 163 Wn2d 166, 178 P.3d 949 (2008).....	12
<i>In re Gault</i> , 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).....	13
<i>In re LaBelle</i> , 107 Wn.2d 196, 728 P.2d 138 (1986).....	9

<i>In re Mines</i> , 146 Wn.2d 279, 45 P.3d 535 (2002).....	16
<i>In re Myrick's Welfare</i> , 85 Wn.2d 252, 533 P.2d 841 (1975).....	12
<i>In re Silva</i> , 166 Wn.2d 133, 206 P.3d 1240 (2009) (No. 81573-9), 2008 WL 6196839.....	8, 16
<i>Kenny A. ex rel. v. Perdue</i> , 356 F. Supp. 2d 1353 (N.D. GA 2005) .....	13
<i>K.E.S. v. Georgia</i> , 134 Ga. App. 843, 216 S.E.2d 670 (1975).....	13
<i>Lucier's Welfare</i> , 84 Wn.2d 135, 524 P.2d 906 (1974).....	12, 13
<i>Samuels Furniture, Inc. v. Wash. Dep't of Ecology</i> , 147 Wn.2d 440, 54 P.2d 1194 (2002).....	10
<i>Santosky v. Kramer</i> , 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).....	13
<i>Smith v. Fontana</i> , 818 F.2d 1411, 1416 (9 <sup>th</sup> Cir. 1987), cert. denied 484 U.S. 935 (1987).....	12
<i>Sorenson v. City of Bellingham</i> , 80 Wn.2d 547, 558, 496 P.2d 512 (1972).....	9
<i>State v. Sansone</i> , 127 Wn. App. 630, 111 P.3d 1251 (2005).....	9, 14
<b>Statutes</b>	
RCW 13.34.100(6).....	3
Chapter 13.34 RCW .....	16

**Rules**

RAP 1.2(c).....10

RAP 7.3; 12.3(a), (b).....10

RAP 8.3.....10

RAP 13.5A(a)(3).....7

RAP 13.5A(b).....7

RAP 13.4(b).....7

RAP 13.4(b)(3).....14

RAP 13.4(b)(3), (4).....8

RAP 13.4(b)(4).....7, 12, 14, 17

RAP 13.7(b).....17

RAP 17.7.....6

RAP 18.1.....17

**Constitutional Provisions**

U.S. Const. amend. XIV.....1

Wash. Const. art. 1, § 3.....1, 4

**Other Authorities**

*A Child’s Right to Counsel: First Star’s National Report Card on Legal Representation for Children*, at 5 (2007), available at <http://www.firststar.org/documents/FIRSTSTARReportCard07.pdf>.....15

*DSHS Children’s Administration 2007 Annual Report*, at 5. Available at <http://www.dshs.wa.gov/pdf/ca/07Report2Intro.pdf>.....7

A. IDENTITY OF PETITIONER

Appellants D.R. and A.R. (the "Children") seek discretionary review of the decision by the Court of Appeals, Division III, designated in Part B of this Motion.

B. COURT OF APPEALS' DECISION

The Children seek review of the Court of Appeals' Order Denying the Children's Motion to Modify Commissioner's Ruling. *In re the Termination of D.R. and A.R.*, No. 27394-6-III Consolidated with 27395-4-III (December 28, 2009). The Order is attached at Appendix A1. The Commissioner's Ruling was filed September 14, 2009. Commissioner's Ruling, *In re Dependency of D.R. and A.R.*, No. 27394-6-III Consolidated with 27395-4-III. The Commissioner's Ruling is attached at Appendix A2-A3.

C. ISSUES PRESENTED FOR REVIEW

1. Do appellate courts have the authority to hear an issue of substantial public interest that is certain to recur but which was rendered technically moot during the appeal by a party's concession?
2. Do dependent children subject to a dependency or parental termination action under RCW Chapter 13.34 have a constitutional right to counsel under the due process clauses of Art. I § 3 of the Washington Constitution and the Fourteenth Amendment of the United States Constitution?

D. STATEMENT OF THE CASE

D.R. and her younger brother, A.R., first entered into foster care in Washington State in February 2004, under a voluntary placement agreement signed by their mother, T.R. CP 3. In May 2007, with no permanent placement prospects for either D.R. or A.R., the Department of Social and Health Services filed a petition to terminate the parental rights of their mother and father. CP 1-8. On August 25, 2008, Stevens County Superior Court Judge Rebecca Baker signed an order terminating the parental rights of D.R. and A.R.'s mother and father. RP 4.

In her appeal, the mother, T.R., raised several issues challenging the termination, one of which was the trial court's failure to provide legal representation for D.R. Appellant's Opening Br., *In re Dependency of D.R. and A.R.*, No. 27394-III at 1 (February 24, 2009). In support of that issue, T.R. argued that all dependent children have a constitutional right to counsel in their dependency and termination proceedings. *Id.* at 37.

T.R. also moved the Court of Appeals for appointment of appellate counsel for the Children. Mot. to Appoint Counsel for Dependent Children, *In re Dependency of D.R. and A.R.*, No. 27394-6-III (February 27, 2009). The Court granted this request and gave leave for the Children to file pleadings. Letter, Clerk of the Court, *In re Dependency of D.R. and A.R.*, No. 27394-6-III (March 16, 2009). In their respective briefs, the

Children argued, in part, that the termination trial was unfair because neither of the children had counsel. Additionally, they argued that all children in dependencies and termination actions have a constitutional right to counsel. Appellant Child D.R.'s Opening Br., *In re Dependency of D.R. and A.R.*, No. 27394-6-III at 2-3 (June 4, 2009); Br. of Resp't A.R., *In re Dependency of D.R. and A.R.*, No. 27394-6-III at 43-46 (June 5, 2009).

The day the State's response to the Children's opening briefs was due, rather than respond to the constitutional issue, the State conceded the trial court abused its discretion under RCW 13.34.100(6), "in failing or refusing to appoint counsel" for A.R. and D.R. and filed a motion to reverse and remand the case to superior court. Mot. to Reverse and Remand Case to Superior Court, *In re Dependency of D.R. and A.R.*, No. 27394-6-III at 1(July 1, 2009). The State also filed a motion for an extension of time to file its response, if necessary. Mot. for Order Extending Time to File Resp't Reply Brief, *In re Dependency of D.R. and A.R.*, No. 27394-6-III at 1(July 1, 2009).

On July 15, 2009, the Children filed a joint response to the State's motion wherein they joined the State's request for reversal and remand but additionally asked the Court of Appeals to retain jurisdiction over the separate legal question raised by the Children and T.R. in their earlier briefs—specifically, whether all children in dependency and termination

proceedings have a constitutional right to counsel. Children's Joint Resp. to State's Mot. to Reverse and Remand, *In re Dependency of D.R. and A.R.*, No. 27394-6-III (July 15, 2009).

In their response, the Children argued that, though upon reversal and remand the case would become technically moot, the Court of Appeals would have authority to hear the constitutional issue under a longstanding exception to the loss of jurisdiction triggered by mootness—the continuing and substantial public interest doctrine.<sup>1</sup> *Id.* at 3-15. To emphasize the substantial import of the constitutional question, the Children provided declarations indicating that numerous local and national organizations were preparing to file amicus briefs on the constitutional right to counsel issue.<sup>2</sup>

---

<sup>1</sup> In her response, T.R. joined the State's request for reversal and remand. Appellant's Resp. to State's Mot. to Reverse and Remand, *In re Dependency of D.R. and A.R.*, No. 27394-6-III (July 16, 2009). Although she did not join the Children's request regarding retention of the constitutional issue, T.R. did not object to bifurcation (as requested by the Children) so long as it "would not in any way delay the reversal of the termination order and reinstatement of the dependency." *Id.* at 2.

<sup>2</sup> National legal organizations, including the National Center for Youth Law and First Star, were prepared to argue that the issue of legal representation for children in foster care is nationally significant and one on which Washington State is out of step. The Center for Children & Youth Justice, TeamChild, Washington Defender Association, and the University of Washington Children and Youth Advocacy Clinic, were prepared to argue that the role of attorneys in dependency and termination proceedings is critical in protecting the legal rights of foster children. A number of children and youth advocacy organizations, led by The Mockingbird Society, were prepared to argue that the effects of a dependency on a child are tremendous, and without counsel, the risk of error cannot be minimized. *See* Children's Joint Resp. to State's Mot. to Reverse and Remand, at 7-8.

The State refused to let the case be bifurcated or let the constitutional issue be heard. In its reply, the State argued that, upon reversal and remand, this case would be “decided”—as opposed to moot—and the court would automatically lose jurisdiction over the case and all issues therein. Dept.’s Reply Br. Supporting Mot. to Reverse and Remand Case to Superior Court, *In re Dependency of D.R. and A.R.*, No. 27394-6-III at 1-2 (July 30, 2009). The State did not challenge the Children’s argument that the constitutional issue is one of continuing and substantial public interest.

On September 2, 2009, the Children filed a joint sur-reply to the State’s response arguing the Court of Appeals had jurisdiction under the substantial public interest doctrine and broad authority under the Rules of Appellate Procedure (RAPs) to reverse and remand on the termination issue while retaining jurisdiction over the constitutional issue. Children’s Sur-Reply on Mot. to Reverse and Remand, *In re Dependency of D.R. and A.R.*, No. 27394-6-III (September 2, 2009). The Children argued that nothing in the RAPs or in case law prohibited the court from retaining jurisdiction over the constitutional issue and that public interest dictated that jurisdiction should be retained.

Telephonic argument on the motion to reverse and remand took place before Commissioner Joyce J. McCown on September 9, 2009. Five days

later, the Commissioner issued her ruling in which she granted the State's motion to reverse the termination of Appellant T.R.'s parental rights and remand to the superior court. *Commissioner's Ruling*, at 3. The Commissioner found that "if the motion for reversal and remand is granted, this decision will be final and not interlocutory in this matter, and thus this Court will no longer have jurisdiction to render a decision on the issue...." *Commissioner's Ruling*, at 1-2. Further, the Commissioner stated that the Children had failed to cite to cases in which "the same court dismissing the matter thus rendering it moot is requested and retains jurisdiction to write an opinion deciding the dispositive issue." *Id.* at 3. Thus, the Commissioner denied the request for a written opinion on the "dispositive issue." *Id.*

Pursuant to RAP 17.7, the Children filed a Motion to Modify the Commissioner's decision. Children's Mot. to Modify Commissioner's Ruling, *In re Dependency of D.R. and A.R.*, No. 27394-6-III (October 14, 2009). The Court of Appeals denied the Children's motion on December 28, 2009. Order Denying Mot. to Modify Comm's Ruling, *In re the Termination of D.R. and A.R.*, No. 27394-6-III (December 28, 2009). The Children timely file this Motion for Discretionary Review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Children seek Supreme Court review under RAP 13.5A(a)(3), which sets forth the *procedures* for a motion requesting discretionary review of a termination of parental rights. RAP 13.5A(b) requires such motions to include the considerations set forth in RAP 13.4(b).

Pursuant to RAP 13.4(b), this Court should accept review because when and whether appellate courts have authority to hear an issue of substantial public interest that was rendered moot during the appeal by a party's concession, thereby evading review, is itself an issue of substantial public interest which this Court should decide. RAP 13.4(b)(4). The consequence of the Commissioner's ruling is that the State has the unilateral power to determine when—if at all—issues of substantial public interest, such as that presented here, may be heard. The State may simply concede error in any case at any time and “moot” the issue—an issue which directly affects over ten thousand children each year.<sup>3</sup>

Additionally, whether children subject to dependency and termination proceedings have a constitutional right to counsel is a question of law under the State and Federal Constitutions, as well as an issue of substantial public interest, which this Court should decide. RAP 13.4(b)(3),(4).

---

<sup>3</sup> See *DSHS Children's Administration 2007 Annual Report*, at 5. Available at <http://www.dshs.wa.gov/pdf/ca/07Report2Intro.pdf>.

1. THE COURT OF APPEALS' UNPRECEDENTED  
LIMITATION OF ITS JURISDICTION TO CONSIDER AN  
ISSUE OF SUBSTANTIAL PUBLIC INTEREST IS ITSELF  
AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST

As this Court recognized in *In re Dependency of A.K.*, the authority of the courts is a matter of public interest. 162 Wn.2d 632, 644, 174 P.3d 11 (2007) (prescribing the conditions under which the courts can use inherent contempt to detain dependent youth). There, this Court determined that the extent of a court's ability to use inherent contempt fell within the substantial public interest exception to mootness for two reasons. First, the public has a "great interest in the care of children and the workings of the foster care system." *Id.* And second, the "authority of the courts is similarly a public matter." *Id.* As this issue was likely to recur, the Court found clarification necessary. *Id.*

The State itself has previously argued, when requesting this Court take up a technically moot issue, that "the public has a great interest in the rights of juveniles who are in need of protection, and *the authority of the court in such cases is a public matter.*" Brief for State of Wash. as Amicus Curiae at 8, *In re Silva*, 166 Wn.2d 133, 206 P.3d 1240 (2009) (No. 81573-9), 2008 WL 6196839 (emphasis added).

Here, the State moved the court to reverse and remand based on its concession. Such an order would render the children's individual cases

technically moot—there would be no further relief the court could provide to them. *In re LaBelle*, 107 Wn.2d 196, 200, 728 P.2d 138 (1986). It is well settled law in this state that an appellate court does not lose jurisdiction over an issue of continuing substantial public interest in an otherwise moot case. *State v. Sansone*, 127 Wn. App. 630, 636-37, 111 P.3d 1251 (2005) (quoting *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)).

The distinction for the court below, however, was that in most published cases, the issues were mooted prior to appeal. Thus, the court essentially found that the substantial public interest exception to mootness applies only where a case is rendered moot by its own “procedural accord” below, but not where the case is rendered moot “by a specific decision” of the appellate court. *Commissioner’s Ruling* at 2.

Whether the substantial public interest exception to mootness does not apply when an issue is mooted on appeal is a question of first impression in Washington. The Children argue that the appellate rules and case law<sup>4</sup> provide support for appellate courts under those circumstances

---

<sup>4</sup> *E.g.*, *State v. Sansone*, 127 Wn. App. 630, 637, 111 P.3d 1251 (2005); *City of Seattle v. Johnson*, 58 Wn. App. 64, 66-67, 791 P.2d 266 (1990). In both *Sansone* and *Johnson*, one of the parties conceded and the appellate court reversed based on that concession. In both cases, the court found that its ruling rendered the case and remaining issues moot but nonetheless took up a constitutional issue under the substantial public interest doctrine. Furthermore, as explained by Division I in *Hong v. Dep’t of Soc. and Health Servs.*, 146 Wn. App. 698, 710, 192 P.3d 21 (2008), an appellate court does not automatically lose

to retain jurisdiction. The Commissioner's ruling relied on a distinction without a difference and one that no other Washington court has thus far recognized.

Court rules grant the Court of Appeals authority to accept jurisdiction over the Children's case. The appellate rules expressly allow courts to issue final decision, which terminate review, or interlocutory decisions, which do not. RAP 7.3; 12.3(a), (b). The rules also allow appellate courts to craft orders in the interest of justice, particularly where necessary to decide issues of substantial and continuing public interest. For example, RAP 1.2(c) provides that courts may waive rules to serve ends of justice. RAP 7.3 grants appellate courts the authority to determine whether a matter is properly before it and to perform all acts necessary or appropriate for a fair and orderly review. And RAP 8.3 allows courts to issue orders to insure effective and equitable review.

A final decision is one which disposes of all issues on review and unconditionally terminates review. *Samuels Furniture, Inc., v. Wash. Dep't of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194 (2002). Only then does the court lose jurisdiction. Thus, whether an appellate order or decision terminates review is determined by the type of decision, order or

---

jurisdiction on remand. Rather, an "appellate court loses jurisdiction when it has made a final order and control of the case has passed out of its hands." *Id.* at 709.

judgment issued. Jurisdiction is thus not lost automatically. Rather, an appellate court loses jurisdiction only when it has determined all of the issues presented and issues a final order terminating review. *See Hong v. Dep't of Soc. And Health Servs.*, 146 Wn. App. 698, 710-11, 192 P.3d 21 (2008) (appellate courts do not automatically lose jurisdiction on remand).

Here, the Court of Appeals had the authority to bifurcate the case, issue a partial reverse and remand on the termination issue,<sup>5</sup> and retain jurisdiction to hear the constitutional issue under the substantial interest doctrine. Neither the State nor the Commissioner cited any authority which would preclude the Court from doing so. By its ruling, the Court of Appeals impermissibly narrowed the scope of appellate jurisdiction and hindered the public's right to have issues of substantial public interest resolved. Without review, the Court of Appeals' order has the unprecedented potential to prevent the judicial resolution of scores of constitutional issues. Ultimately, the Court of Appeals' order vests the State with almost unfettered power to control whether and when courts may rule on the constitutional rights of Washington State's dependent children—the Commissioner's Ruling allows the fox to guard the henhouse.

---

<sup>5</sup> If the court did not wish to use the term or concept of reversal and remand, it could have simply issued an interlocutory order accomplishing the same goals—directing the trial court to vacate the termination but waiting to issue a full and final decision until the constitutional issue was fully briefed and considered.

This Court should accept review of this issue because it “involves an issue of substantial public interest” under RAP 13.4(b)(4).

2. CHILDREN’S RIGHT TO COUNSEL IN DEPENDENCY AND TERMINATION PROCEEDINGS INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS

In general, whether a person has a right to counsel is a question of law. *In re Det. of Kistenmacher*, 163 Wn.2d 166, 170, 178 P.3d 949 (2008) (citation omitted). The key issue in determining whether counsel should be present in a proceeding is whether the individual is being deprived of “liberty.” *In re Myrick’s Welfare*, 85 Wn.2d 252, 255, 533 P.2d 841 (1975) citing *In re Lucier’s Welfare*, 84 Wn.2d 135, 524 P.2d 906 (1974).

Children have fundamental liberty and privacy interests at stake in dependency and termination proceedings, including the right to familial relationships and the right to be reasonably free from harm while in State custody. *Smith v. Fontana*, 818 F.2d 1411, 1416 (9th Cir. 1987), cert. denied 484 U.S. 935 (1987) (overruled on other grounds) (“The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship.”); *Braam v. State of Washington*, 150 Wn.2d

689, 699, 81 P.3d 851 (2003) (holding that foster children have a “substantive due process right to be free from unreasonable risk of harm and to reasonable safety”); *In re Custody of Shields*, 157 Wn.2d 126, 130, 136 P.3d 117 (2000) (Bridge, J. concurring) (recognizing constitutional protection of a child’s interest in his or her familial bonds as stated in *Santos*); *In re C.R.B.*, 62 Wn. App. 608, 814 P.2d 1197 (1991) (child has an interest in preventing the erroneous termination of parental rights) citing *Santosky v. Kramer*, 455 U.S. 745, 765, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (parents and the child share interest in avoiding erroneous termination).<sup>6</sup> Further, a child’s liberty interests are at risk where, as the result of parental termination, the child may be committed to the care of an institution. *In re Lucier’s Welfare*, 84 Wn.2d at 139.

These rights are significant and trigger constitutional guarantees of due process under the Fourteenth Amendment of the United States Constitution and/or Art. 1, § 3 of the Washington Constitution. This Court

---

<sup>6</sup> See also *Kenny A. ex rel. v. Perdue*, 356 F. Supp. 2d 1353, 1359-60 (N.D. GA 2005) (“It is well settled that children are afforded protection under the Due Process Clauses of the United States and the Georgia Constitution and are entitled to constitutionally adequate procedural due process when their liberty or property rights are at stake.”) citing *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) (lack of adequate procedures used by school in suspending students violated due process); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (holding that minors have due process right to counsel in delinquency proceedings); *K.E.S. v. Georgia*, 134 Ga. App.843, 847, 216 S.E.2d 670 (1975) (recognizing minors' right to counsel established in *In re Gault* ).

should accept review of this issue because it involves a significant question of law under the federal and state constitutions. RAP 13.4(b)(3).

3. CHILDREN'S RIGHT TO COUNSEL IN DEPENDENCY AND TERMINATION PROCEEDINGS INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST

The question of whether children possess a due process right to counsel under the State and Federal Constitutions, an issue of first impression for Washington courts, is a matter of continuing and substantial public interest, and thus, this Court should accept review under RAP 13.4(b)(4).

Perhaps most significant is that in failing to address the Children's argument that the constitutional issue is one of continuing and substantial public interest, the State effectively conceded that it is an issue that rises to this level. Dept.'s Reply Br. Supporting Mot. to Reverse and Remand Case to Superior Court, *In re Dependency of D.R. and A.R.*, No. 27394-6-III (July 30, 2009).

Regardless of the State's concession, Washington courts have held that "[w]here a technically moot issue implicates *due process rights*, it is one in which there is sufficient public interest to warrant deciding it." *Sansone*, 127 Wn. App. at 638 (quoting *In re Dependency of H.*, 71 Wn. App. 524, 528, 859 P.2d 1258 (1993)) (emphasis added). And, as noted above, this Court held in *A.K.* that "[a]lthough the due process rights of

juveniles are individual rights, *the public has a great interest in the care of children and the workings of the foster care system.*” 162 Wn.2d at 643-44 (emphasis added).

The public nature of the constitutional question is further evidenced by the fact that, as noted above, numerous local and national organizations intended to file amicus curiae briefs below in support of the Children’s contention that all children possess a constitutional right to counsel in dependency and termination proceedings. *See* Children’s Joint Resp. to State’s Mot. to Reverse and Remand, at 7-8. The issue has also been taken up by the American Bar Association, the State’s Supreme Court Commission on Children in Foster Care, and has been the subject of multiple sessions at statewide conferences involving dependency stakeholders such as the Department and the courts. *Id.* at 9.<sup>7</sup>

Beyond the public nature of the constitutional question, this case also presents an issue of first impression for Washington courts—there are no Washington appellate decisions on record regarding when and under what circumstances dependent children should receive counsel, and each Washington State county handles appointment of counsel in an entirely

---

<sup>7</sup> Furthermore, Washington is among the minority of states that does not mandate legal representation for children in abuse and neglect proceedings. A 2007 report found that 36 states and the District of Columbia already mandate appointment of attorneys for all dependent children. *See A Child’s Right to Counsel: First Star’s National Report Card on Legal Representation for Children*, at 5 (2007), available at <http://www.firststar.org/documents/FIRSTSTARReportCard07.pdf>.

different manner, resulting in inconsistent practices among (and sometimes within) counties. *Id.* at 9-10. This Court has found the “lack of applicable case law in Washington” to be indicative of the desirability “to provide judicial guidance ....” *City of Yakima v. Mollett*, 115 Wn. App. 604, 607, 63 P.3d 177 (2003). An authoritative decision is necessary if it “will provide useful guidance to juvenile court judges,” *In re Silva*, 166 Wn.2d at 137 n.1 (citing to *A.K.*, 162 Wn.2d at 643), or will “guide public officials.” *In re Mines*, 146 Wn.2d 279, 285, 45 P.3d 535 (2002).

Finally, the issue of a child’s right to counsel in dependency and termination proceedings presents a constitutional interpretation issue, which the Washington Supreme Court has noted are more likely to recur. *See Mines*, 146 Wn.2d at 285 (constitutional or statutory interpretation issues are “more likely to arise again”). Any child in Chapter 13.34 proceedings who is not represented by an attorney will have the same constitutional due process claim as D.R. and A.R.—the issue not only affects thousands of children in ongoing dependency actions, but thousands more in yet-to-be filed actions. Given the number of children that this issue affects, the fact that it has not been resolved in a reported or unreported decision by any Washington appellate court emphasizes how this issue has evaded and continues to evade review.

Ultimately, the State could concede every time it sought to avoid this important constitutional issue and thus evade review entirely, or just wait for more “favorable” facts to allow an appellate court to review the issue. Children’s Sur-Reply on Mot. To Reverse and remand, *In re Dependency of D.R. and A.R.*, No. 273946-III (September 2, 2009).<sup>8</sup>

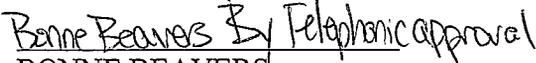
Because the Children present an issue of substantial public interest, this Court should accept review under RAP 13.4(b)(4).

F. CONCLUSION

This Court should accept review for the reasons indicated in Part E above. Should the Court grant review and reverse the Court of Appeals’ decision not to bifurcate the case and retain the constitutional issue, the Court may either consider and decide the constitutional issue itself or remand to the Court of Appeals for a determination under RAP 13.7(b). The Children also request an award of fees as authorized under law and allowed by RAP 18.1.

Respectfully submitted January 27, 2010,

  
ERIN SHEA MCCANN, WSBA 39418  
CASEY TRUPIN, WSBA 29287  
Columbia Legal Services  
Attorneys for Child, D.R.

  
BONNE BEAVERS  
WSBA 32765  
Center for Justice  
Attorney for Child, A.R.

<sup>8</sup> In fact, the State’s strong objection to consideration of the constitutional issue underscores its intent to forestall review of this issue.

Ultimately, the State could concede every time it sought to avoid this important constitutional issue and thus evade review entirely, or just wait for more "favorable" facts to allow an appellate court to review the issue. Children's Sur-Reply on Mot. To Reverse and remand, *In re Dependency of D.R. and A.R.*, No. 273946-III (September 2, 2009).<sup>8</sup>

Because the Children present an issue of substantial public interest, this Court should accept review under RAP 13.4(b)(4).

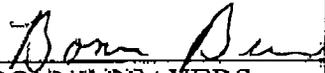
F. CONCLUSION

This Court should accept review for the reasons indicated in Part E above. Should the Court grant review and reverse the Court of Appeals' decision not to bifurcate the case and retain the constitutional issue, the Court may either consider and decide the constitutional issue itself or remand to the Court of Appeals for a determination under RAP 13.7(b). The Children also request an award of fees as authorized under law and allowed by RAP 18.1.

Respectfully submitted January 27, 2010,

---

ERIN SHEA MCCANN, WSBA 39418  
CASEY TRUPIN, WSBA 29287  
Columbia Legal Services  
Attorneys for Child, D.R.

  
BONNE BEAVERS  
WSBA 32765  
Center for Justice  
Attorney for Child, A.R.

---

<sup>8</sup> In fact, the State's strong objection to consideration of the constitutional issue underscores its intent to forestall review of this issue.

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

10 JAN 27 AM 9:36

BY RONALD R. CARPENTER **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 January 27, 2010, I caused to be served a true and correct copy of the Children's Joint Motion for Discretionary Review, by sending it via office e-mail with copy receipt to the following:

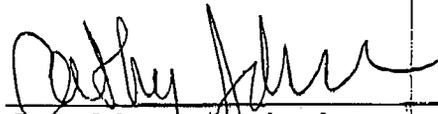
Casey Trupin WSBA # 29287  
Staff Attorney  
emailto:Casey.Trupin@ColumbiaLegal.org

Erin K. Shea McCann WSBA # 39418  
Attorney at Law  
Equal Justice Works Fellow  
Columbia Legal Services  
emailto:Erin.SheaMcCann@columbialegal.org

Jan Trasen WSBA 41177  
Washington Appellate Project  
emailto:jantrasen@gmail.com

2. On January 27, 2010, I caused to be served a true and correct copy of the Children's Joint Motion for Discretionary Review, by hand delivering it to the following:

Kelly E. Konkright  
Washington State Attorney General Office  
1116 W. Riverside Avenue  
Spokane, WA 99201-1106



Cathy Johnson, Paralegal  
Center for Justice  
35 W. Main, Suite 300  
Spokane, WA 99201

SUPREME COURT  
OF THE STATE OF WASHINGTON

---

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

State of Washington

v.

Tonya Roberts

---

DECLARATION IN COMPLIANCE WITH GR 17(a)(2)

---

I declare under penalty of perjury under the laws of the State of Washington as follows:

I am the legal assistant for the Attorneys for D.R. I have examined the Children's Joint Motion for Discretionary Review consisting of twenty-nine pages, including this page, which are complete and legible. I received this faxed signature from Bonne Beavers at my facsimile number of (206) 382-3386.

I have also examined the Certificate of Service for the above document consisting of one page, which is complete and legible. I

//

//

received this faxed signature from Cathy Johnson at my facsimile  
number of (206) 382-3386.

Signed at Seattle, WA on this 26<sup>th</sup> day of January, 2010.

A handwritten signature in black ink, appearing to read "Leslie A. Creamer", with a long horizontal flourish extending to the right.

Leslie A. Creamer, Legal Assistant  
Columbia Legal Services  
101 Yesler Way, Ste. 300  
Seattle, WA 98104

# APPENDIX A



FILED

The Court of Appeals  
of the  
State of Washington  
Division III

SEP 14 2009

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

In re the Termination of:	)	COMMISSIONER'S RULING
	)	NO. 27394-6-III
D.R. and A.R.	)	CONSOLIDATED WITH
	)	27395-4-III

Having considered the Department of Social and Health Services' (DSHS) "Motion to Reverse and Remand Case to Superior Court," the responses, reply, and sur-reply thereto, including the request that this Court render an opinion on the constitutional issue presented regarding the right to legal counsel of children subject to proceedings under RCW 13.34, the record, file, and oral argument of counsel, and while the mother and the children agree with the motion to reverse and remand and that such action by this Court would render this appeal moot, and this Court being of the opinion that if the motion for reversal and remand is granted, this decision will be final and not interlocutory in this matter, and thus this Court will no longer have jurisdiction to render

a decision on the issue, *Hong v. DSHS*, 146 Wn. App. 698, 710, 192 P.3d 21 (2008);<sup>1</sup> and further, the cases, regarding the application of the exception to the mootness doctrine, which are relied on by the children to support their request are distinguishable in that they were rendered moot, not by a specific decision of a court as would occur here, but rather by their own procedural accord, for example *See: In re the Interest of Silva*, 166 Wn. 2d 133, 206 P.3d 1240 (2009) (juvenile's incarceration for 45 days for contempt of court had expired), *In re Dependency of A.K.*, 162 Wn. 2d 632, 174 P.3d 11 (2007) (a juvenile's sentence to 30 days in detention for contempt had expired), *In re Detention of J.S.*, 138 Wn. App. 159 P.3d 435 (2007) (involuntary 90-day civil commitment had expired), *In re Personal Restraint Petition of Silas*, 135 Wn. App. 564, 145 P.3d 1219 (2006) (Petitioner challenging the early release eligibility policy was released from prison rendering the case moot), *State v. Sansone*, 127 Wn. App. 630, 111 P.3d 1251 (2005) (60 days of confinement for violation of defendant's community placement condition already served), *In re Det. of T.A.H.-L.*, 123 Wn. App. 172, 97 P.3d 767 (2004) (H.-L.'s 90-day involuntary commitment had expired), *City of Yakima v.*

---

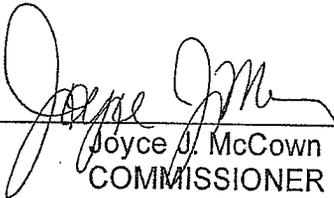
<sup>1</sup> "The interest in finality requires that there be a determinable point in time at which litigation ceases. To require courts to consider and reconsider cases at the will of litigants would deprive the courts of that stability which is necessary in the administration of justice. . . . *Pierce County Sheriff [v. Civil service Commission for Sheriff's Employees of Pierce County]*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983)] cannot be read to say that a 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. 98 Wn.2d 695. Had the first order been interlocutory rather than final, the court would not have lost jurisdiction." *Hong v. DSHS*, 146 Wn. App. at 710.

No. 27394-6-III

*Mollett*, 115 Wn. App. 604, 63 P.3d 177 (2003) (challenge to "cash only bail" rendered moot by the posting of the bail and the release of the defendant), *In re Placement of R.J.*, 102 Wn. App. 128, 5 P.3d 1284 (2000) (voluntary placement agreement for a 30-day evaluation had expired), and counsel for the children has failed to cite to any cases in which the same court dismissing the matter thus rendering it moot is requested and retains jurisdiction to write an opinion deciding the dispositive issue; now, therefore,

IT IS ORDERED, the parties having agreed, the motion to reverse and remand is granted. The request for a written opinion by this Court on the dispositive issue is denied.

September 14, 2009.

  
\_\_\_\_\_  
Joyce J. McCown  
COMMISSIONER