Supreme Court No. 92028-1

(Court of Appeals No. 72914-4-I)

SUPREME COURT
OF THE STATE OF WASHINGTON

THE ESTATE OF CONCEPCION WHITTENBURGE
Plaintiff –Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

Defendant-Respondent,

AMENDED PETITION FOR REVIEW

Guidance to Justice Law Firm, PLLC
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I. IDENTITY OF PETITIONER

Petitioner Concepcion Whittenburge was the Plaintiff in the original action in Snohomish County Superior Court, Cause No. 14-2-04713-2. She passed away pending her appeal and the Estate of Concepcion Whittenburge ("Estate") filed a motion to substitute in the Court of Appeals, Division I, Cause No. 72914-4-I (motion was denied).

II. COURT OF APPEALS DECISION

The Estate seeks review of the Court of Appeals ruling dismissing the appeal as moot and lacking standing filed on July 6, 2015, a copy of which is attached as Exhibit A. Specifically, the Estate seeks this Court's review of the Court of Appeals' analysis, interpretation and application of the lack of standing issue when it was never raised below and its convoluted analysis of mootness. The case became moot upon Ms. Whittenburge's death on October 18, 2014; however, the trial court continued to rule on the merits of the case even though it had no authority to do so.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the decision of the Court of Appeals is in conflict with a decision of this Court when:

    a. The Court of Appeals reviewed and decided the standing issue, that allows the trial court's final order to go unfettered, even though that issue was never raised below;

b. The Court of Appeals denied the Estate's motion to substitute in as a party even though the appeal was pending prior to Ms. Whittenburge's death;
c. The Court of Appeals denied review of the trial court's decision to issue findings of fact and conclusions of law against deceased person

2. Whether these issues arising from the decision of the Court of Appeals are issues of substantial public interest, including a significant question of law under the United States Constitution that requires review by this Court?

IV. INTRODUCTION

How did we get here? The trial court abused its power by creating new findings of fact and conclusions of law ("FFCL") against a deceased person. And now the Court of Appeals has made sure those findings and conclusions can never be challenged. Even though DSHS did not raise the standing issue below, the trial court denied both a motion for reconsideration and a motion to vacate without any justification for the denials, and the Court of Appeals dismissed the appeal for lack of standing, despite this issue never being raised below. CP 1. Instead of protecting and serving our community, DSHS continues to oppose and argue that the new FFCL against a deceased person should stand, even though they cannot be challenged because Ms. Whittenburge was deceased at the time they were issued. CP 2-6; 20-22.

The Commissioner recognized that "the merits of Whittenburge's petition for judicial review" is not moot. It is that portion that prejudices

Ms. Whittenburge's daughter as that portion will be used against the daughter to prevent her from being employed as an Individual Provider. *See* Exhibit B Commissioner's ruling at 5.

Ms. Whittenburge's appeal was scheduled to be heard in the Superior Court on November 3, 2014, but she passed away on October 18, 2014. Despite her passing, the trial court ruled against her on November 3, 2014. The judgment order ("Order") is prejudicial against an heir of her estate, her daughter, Antonia Bryant as this Order will prevent Ms. Bryant from being employed as an Individual Provider. From the beginning of this case DSHS has abused its own authority and the court's authority to procedurally block justice from being served.

V. STATEMENT OF THE CASE

1. Factual Background.

This case involves the entry of an order by the Snohomish County Superior Court on an appeal of administrative agency action by the Department of Social and Health Services ("DSHS"). That appeal involved a finding by DSHS that Ms. Whittenburge had terminated her caregiver pursuant to WAC 388-71-0505. CP 43; 2-3. In reality, DSHS took action to terminate Ms. Whittenburge's choice of caregiver, her daughter Antonia Bryant, based on its initial allegation of neglect, even though DSHS lacked supporting evidence that Ms. Whittenburge was in

fact neglected by Ms. Bryant. CP 68; 12-15.

Ms. Bryant appealed DSHS's finding of neglect and requested a hearing. CP 69; 3-7. Days before the hearing, and after reviewing Ms. Bryant's evidence showing there was no neglect, DSHS changed its initial findings from 'substantiated' to 'inconclusive,' thereby procedurally foreclosing Ms. Bryant from pursuing an appeal on the merits. *Id.* Ms. Bryant's appeal was thereafter dismissed by the administrative court because DSHS had reduced its allegation of substantiated neglect to a finding of inconclusive. CP 69, 74;18.

While Ms. Whittenburge had a due process right to appeal DSHS's termination of the contract between Ms. Whittenburge and her caregiver, she was not given notice of her right to appeal. CP; 4-6. DSHS claimed Ms. Whittenburge terminated the contract with her daughter, Antonia Bryant; thus, she was not entitled to notice. CP 75. Nevertheless, Ms. Whittenburge appealed to the board of appeals (BOA) and the BOA judge affirmed that Ms. Whittenburge terminated the contract even though there was evidence to the contrary and that DSHS was not required to give Ms. Whittenburge notice of the termination of her choice of IP. CP 60-91; 23-38. The termination of the contract between Ms. Whittenburge and her daughter Antonia Bryant was affirmed by BOA judge despite the fact that DSHS changed its initial findings to 'inconclusive' and thus no evidence

of neglect was before them. CP 69, 74:18.

Thereafter, the trial court improperly ruled on the merits of the case against a deceased person. Ms. Whittenburge's counsel quickly filed a motion to reconsider and motion to vacate the Order. CP 11-13; 14-19. The trial court denied both motions. CP 1. Ms. Whittenburge and her estate properly appealed the trial court's Order that issued new FFCL against a deceased person. CP 20-22. The trial court abused its discretion when it ruled on the merits of the case and affirmed the BOA judge's order, because the trial court no longer had jurisdiction, the ruling was made unreviewable upon Ms. Whittenburge's death and the fact that an heir of the Estate is prejudiced by this Order may go unfettered. CP 20-22; CP 23-38; CP 60-91. That Order, and the subsequent denial of the motions to reconsider and to vacate, will prevent an heir of Ms. Whittenburge, her daughter, Ms. Bryant from ever being employed by DSHS as an Individual Provider. CP 1, 20-22. Moreover, the Order and the subsequent denial of each motion are contrary to well established case law by our Supreme Court.

2. Procedural Background.

On June 25, 2014, Ms. Whittenburge appealed the BOA judge's final order to the Snohomish County Superior Court. On October 18, 2014, while the Petition for Judicial Review was pending, Ms.

Whittenburge passed away. Oral argument was held on November 3, 2014. As a result of her passing, the Court deemed her appeal moot, but proceeded to determine the merits of the case and entered new FFCL. CP 20-22. On November 10, 2014, Ms. Whittenburge filed a motion to vacate the judgment and to reconsider. CP 14-19; 11-13; and 1. Both motions were denied. Thereafter, Ms. Whittenburge appealed to the Court of Appeals. DSHS moved to dismiss the appeal claiming that neither Ms. Whittenburge nor her estate, which had moved to substitute in her place, had standing to pursue the matter as it was mooted upon her death. DSHS did not challenge standing in the trial court. CP 2-6. DSHS argued; even though its argument is in conflict with this Court's well-established case law, that even though this case was moot as a matter of law, the new FFCL entered *against a deceased person* should stand. CP 2-6. The Commissioner granted DSHS' motion to dismiss, holding the Estate lacks standing as it is not aggrieved by the new FFCL entered by the trial court; namely, that there was no proprietary, pecuniary or personal interest of the Estate, or anyone benefitting from it at issue and the case was moot as a matter of law. Exhibit B. Thereafter, the Estate of Whittenburge filed a motion to modify the commissioner's ruling and that motion was denied. Exhibit A.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

> *"An injustice anywhere is a threat to justice everywhere."* Martin Luther King, Jr., Letter from Birmingham Jail, April 16, 1963.

The present petition is brought under RAP 13.4 (b)(1), the Court of Appeals' decision is in conflict with a decision of the Supreme Court; 13.4 (b)(3), significant question of law under the state or federal Constitution; and 13.4 (b)(4) an issue of substantial public interest including a significant question of law under the United States Constitution that should be determined by the Supreme Court.

A. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH A DECISION OF THIS COURT

Here, the Court of Appeals' decision is in conflicts with this Court's prior decisions in four ways. First, it denied review of the trial court's decision to issue findings of fact and conclusions of law against deceased person when this Court has held, since at least 1917, that no court has jurisdiction over a deceased person. Second, by denying review based on standing, it disregarded this Court's well-established case law that an issue of standing will not be reviewed if it was never raised at the trial court. RAP 2.5(a). Third, it denied the Estate's motion to substitute in as a party even though the appeal was pending prior to Ms. Whittenburge's death and this Court has instructed parties that substitution

is the correct procedure. Fourth, it denied review of the trial court's decision to *not* vacate an Order against a deceased person, even though this Court has held, since at least 1905, that a judgment rendered against a deceased person is void as a matter of law.

1. Denial of review of the trial court's decision to enter findings against a deceased person

When a person has passed away, the Court no longer has personal jurisdiction over that party. *Picardo v. Peck*, 95 Wash. 474, 475, 164 P.65 (1917). Without personal jurisdiction, a court cannot adjudicate against an individual. *In re Marriage of Powell*, 84 Wn. App. 432, 437, 927 P.2d 1154 (Ct. App. Div. 3 1996) citing *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957). When the trial court proceeded on the merits of the case even though it deemed the matter moot, its analysis should have stop there. Moot is moot. In *Harbor Lands LP v. City of Blaine*, the Court of Appeals agreed when it held,

> "this case was moot at the time the superior court entered judgment. Accordingly, we vacate that judgment and remand the cause to the superior court with directions to enter an order of dismissal with prejudice."
>
> 146 Wn. App 589, 591,191 P.3d 1282 (2008).

The Court of Appeals refused to even review the trial court's findings, which were issued in direct conflict with both this Court's and the United States Supreme Court's decisions. Refusing review allowed the

judgement and findings issued by the trial court, which substantially benefit DSHS, to stand unchallenged.

2. Standing was challenged for the first time on appeal in contradiction to established law.

The Court of Appeals reviewed the standing issue when it was not raised below. The case law on this issue is abundant and this court has repeated – we must raise all issues at the trial court in order for those issues to be preserved and reviewed at the higher court. *State v. Harner*, 153 Wn.2d 228, 234, 103 P.3d 738 (2004); *see also Baker v. Teachers Ins. & Annuities Assoc. College Retirement Equity Funds*, 91 Wn.2d 482, 484, 588 P.2d 1164 (1979). Washington law is very clear: If the standing issue is not raised at the trial court it cannot be raised on appeal. RAP 2.5(a).

The court in *Harner* stated the following:

> The issue of standing is waived if not presented to the trial court and is, therefore, not reviewable on appeal. *State v. Cardenas*, 146 Wn.2d 400, 405, 47 P.3d 127 (2002). Because the State failed to raise the issue of Petitioners' standing at trial, the issue is waived and will not be reviewed by this court.
>
> *State v. Harner*, 153 Wn.2d at 234; see also *Baker*, 91 Wn.2d at 484.

DSHS had the liberty to assert the standing issue anytime at the trial court, yet it failed to do so. See CP 2-6. *First*, when the court ruled the case was moot, but then issued new FFCL against a deceased person,

DSHS did not challenge standing. *Second*, when Ms. Whittenburge's counsel filed and served a motion for reconsideration to strike any and all FFCL, DSHS did not challenge standing. *Third*, when Ms. Whittenburge's counsel filed and served a motion to vacate the judgment order, DSHS did not challenge standing. CP 2-6. But now, on appeal, DSHS challenges standing for the first time in order to prevent Ms. Whittenburge and/or her Estate from seeking this Court's review of the trial court's unprecedented new FFCL that were made against a deceased person. More importantly, if there is no standing now, there was no standing on November 3, 2014 and the trial court had no authority to issue new FFCL.

The Estate urges this Court to follow well established case law that holds when the issue of "standing" was not raised in the trial court then it may not be considered on appeal as a sword. The Court of Appeals should not have considered it because it is in direct conflict with this Court's decisions not to review issues that were never raised at the trial court. Therefore, the appeal was improperly dismissed.

3. Motion to Substitute is the correct procedure

When a party dies during a pending case, substitution of the Estate for that party is appropriate. *State v. Webb*, 167 Wn.2d 470, 478, 219 P.2d 695 (2009). Further, RAP 3.2, providing for substitution of parties on appeal, is the appropriate avenue for heirs to pursue the appeal on the

merits. *Id.* at 472. Also, this Court has held, "we do not preclude courts from deciding a criminal appeal on the merits after the appellant has died, if doing so is warranted." *State v. Devin*, 158 Wn.2d 157, 172, P.3d 599 (2006).

In *State v. Webb*, Webb filed an appeal of his conviction but after the appeal was filed he was brutally murdered. The State argued that the defendant's death mooted the appeal and thus the conviction should stand. *Webb*, 167 Wn.2d at 476. Defendant's counsel argued that the conviction should be abated. *Id.* This Court acknowledged the conflict between both arguments and resolved it by turning to the rules of appellate procedure concerning substitution of parties on appeal. RAP 3.2(a). *Webb*, 167 Wn.2d at 477-78. The Court remanded the case back to the court of appeals with instructions to allow a motion to be made to substitute the Estate as a party in order to pursue the appeal on the merits. *Id.*

Here, the Estate followed that established procedure when it substituted itself for Ms. Whittenburge who passed away while the appeal was still pending in the trial court. That was the appropriate action.

Thus, it was error for the Court of Appeals to deny the Estate's motion to substitute, along with granting the motion to dismiss claiming that the Estate was not aggrieved by the trial court's decision. This was error because "[a]n aggrieved party is one whose proprietary, pecuniary, or

personal rights are substantially affected." *Polygon NW Co. v. Am. Nat'l Fire Ins.* Co., 143 Wn. App. 753, 767, 189 P.3d 777 (2008) citing *Cooper v. City of Tacoma*, 47 Wn. App. 315, 316, 734 P.2d 541 (1987). This Court in Polygon went on to say:

> ... the pertinent inquiry is whether the *trial court* entered a judgment that substantially affects a legally protected interest of the would-be appellant. [Emphasis added]
>
> *Polygo*n, 143 Wn. App. at 768.

Here, the Court of Appeals upheld the trial court's final judgment of the new FFCL which foreclosed Ms. Whittenburge's daughter from obtaining further work from DSHS. As Ms. Whittenburge's daughter is an heir of the Estate, and the FFCL directly affects her legal right to obtain employment with DSHS as an Individual Provider, Ms. Whittenburge's daughter has standing to bring this appeal. CP 75; 8-22. Ms. Whittenburge's and her daughter's rights are inextricably intertwined, as discussed in section B below.

The rules of appellate procedure are "liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2 (a). In that spirit, the appellate court may waive or alter the provision of any rule to serve the ends of justice, subject to certain restrictions that do not apply here. RAP 1.2(c)

Even if this Court finds that the Estate is not an aggrieved party, it

urges this Court to invoke RAP 1.2(a) and (c) by permitting the Estate to proceed as an aggrieved party. An injustice transpired when the trial court ruled against a deceased person and entered new FFCL anyway, and then denied the decedent's motion to vacate that order. Civil rule 60(b)(8), (9) is clear with respect to vacating a judgment order of a party who has passed away before the judgment was entered. CP 11-13.

4. The trial court's findings should have been vacated

Because Ms. Whittenburge was deceased when the trial court entered its findings, those findings are void. *Allen v. Peterson*, 38 Wash. 599, 603; 80 P. 849 (1905), the Supreme Court stated: "Unquestionably, a judgment rendered against a dead person is void..." Furthermore, under the doctrine of equitable vacatur this Court has the authority to vacate the judgment order issued by the trial court. CR 60(b)(8), (9). CP 20-22. It should do so here because the trial court's order will forever be used against Ms. Whittenburge's daughter and former caregiver to prevent her from being employed by DSHS as an Individual Provider. Ms. Whittenburge's appeal was not properly determined because the order was entered after she was deceased. *See United States v. Munsingwear*, 340 U.S. 36, 41, 71 S.Ct. 104, 95 L.ed. 36 (1950) (vacating trial court's judgment in a moot case is commonly utilized...to prevent a judgment, unreviewable because of mootness, from spawning any legal

consequences'").

B. THIS PETITION INVOLVES ISSUES OF SUBSTANTIAL PUBLIC INTEREST THAT INVOLVES DUE PROCESS THAT SHOULD BE DETERMINED BY THIS COURT.

Appellants like, Ms. Whittenburge, depend on a judicial system that is equally fair between the appellant and the State. To allow a trial court and thereafter the Court of Appeals to disrespect our judicial system by ruling against a helpless deceased person will have a ripple affect against Washington residents. The over-reaching of the trial court that issued new FFCL upon a deceased person and thereafter affirmed by the Court of Appeals is an issue of substantial public interest. The reason judgments should not be entered against deceased persons is to prevent this very situation, where a judgment, unreviewable because of mootness, spawns a legal consequence. *See Munsingwear*, 340 U.S. at 41.

The Court of Appeals' decision spawn new legal consequences on two levels. First, if their decision is allowed to stand it will change the law to allow courts to enter judgments against a deceased person. Here, the Court of Appeals granted DSHS's motion to dismiss because the case was moot. The case was mooted upon Ms. Whittenburge's death, on October 18, 2014, before the trial court issued its FFCL on November 3, 2014. Thus, Whitteburge and her Estate appealed this case in order "to prevent a

judgment, unreviewable because of mootness, from spawning any legal consequences'" *Id.* This is the crux of the appeal.

It is true the case was moot, but it was already moot before the trial court entered its findings. The Estate appealed to remedy the fact that the trial court should have dismissed based on mootness, but instead entered new FFCL against a deceased person. The trial court's ruling essentially "un-mooted" a case that cannot be reviewed by a higher court. *See* Exhibit B Commissioner's ruling at 5.

Second, the underlying judgment creates new legal consequences that no one can dispute or challenge. As a result of the underlying judgement, DSHS will be allowed to terminate Individual Providers without giving proper notice to vulnerable adults thereby striping away the vulnerable adult's right under our Constitution with notice and the opportunity to be heard. Washington State Constitution, Article 1, § 3; CP 20-22. This will affect a large class of Washington's most vulnerable citizens.

The legislature has found that "adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care..." *Welfare of Colyer*, 99 Wn.2d 114, 118, 660 P.2d 738 (1983). This includes choosing their own individual provider and this right cannot be taken away without notice and an opportunity to be heard. See *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994).

This due process is afforded by both the United States and Washington Constitutions. U.S. Const. Amend. 5 and Amend. 14 §1; Const. art. 1, § 3.

The underlying case turned on whether DSHS had provided Ms. Whittenburge with due process. CP 60-91. Although Ms. Whittenburge was the petitioner below, the case affects more than just her, as does every case of this nature. DSHS denied her choice of provider because that provider had been investigated for abuse, but the findings were inconclusive. This situation is very common. DSHS investigates an individual provider, makes a finding of "substantiated" and then changes it to "inconclusive" when the person being investigated appeals, thus cutting off their ability to challenge the investigation. Then when the recipient of services wants to hire that person they are barred by a decision they were unable to appeal. CP 60-91. In fact, the week before this case was decided by the Board of Appeals, another case with similar facts was decided by a different judge and that judge came to a different conclusion and ruled against DSHS. CP 80-91.

The Estate only asked the Court of Appeals to review the portion of the judgment that was entered against Ms. Whitenburge after her death, which substantially benefitted DSHS. That is also the portion of the judgment the Estate seeks review by this Court.

This court should accept review to vacate the judgement entered

against a deceased person. But, in the alternative, if the judgment is allowed to stand the Estate should be permitted to appeal the judgment on the merits.

VII. CONCLUSION

This Court should accept review for three reasons. First, the Court of Appeals' decision is in direct conflict with long and established precedent of this Court. Second, this petition involves an issue of substantial public interest. Third, the underlying case involves a federal constitutional question, namely due process.

Therefore, this Court should accept review, so the findings can be vacated and an order of dismissal with prejudice can be entered, so that this unreviewable judgment does not spawn any new legal consequences and forever bar Ms. Whittenburge's daughter from being employed with DSHS as an Individual Provider. In the alternative, if this judgment is allowed to stand, this Court should permit the case to be appealed on the merits.

Dated this 24th day of August, 2015.

Guidance to Justice Law Firm, PLLC

By: /s/ Mary C. Anderson
Mary C. Anderson, WSBA 44137
Attorney for Appellant Concepcion Whittenburge
and the Estate of 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 August 24, 2015, I caused the *AMENDED* PETITION FOR REVIEW to be filed and served upon Washington State Supreme Court, Court of Appeals, Division I; and a copy 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 24th day of August, 2015

/s/ Mary C. Anderson
Mary C. Anderson

OFFICE RECEPTIONIST, CLERK

To: Mary Anderson
Subject: RE: Filing of Amended Petition for Review

Received 8/24/15

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Mary Anderson [mailto:mary@guidancetojustice.com]
Sent: Monday, August 24, 2015 1:39 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: RE: Filing of Amended Petition for Review

File with Supreme Court on August 24, 2015:

Attached please find Petitioner's amended petition for review.

Case: Whittenburge v. State of Wash., DSHS
COA case no.: 72914-4-I

Filed by:
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Guidance To Justice Law Firm, PLLC is a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CONCEPCION WHITTENBURGE, Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	)	No. 72914-4-I ORDER DENYING MOTION TO MODIFY

The Estate of Concepcion Whittenburge has moved to modify the court commissioner's March 17, 2015 ruling dismissing the appeal for mootness and lack of standing. Respondent Department of Social and Health Services has filed an answer, and the Estate has filed a reply. We have considered the motion under RAP 17.7 and RAP 3.1 and have determined that it should be denied. Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Done this 6th day of July, 2015.

Trickey, J

Spearman, C.J.

EXHIBIT B (PAGE 1 OF 6)

The Court of Appeals
of the
State of Washington

RICHARD D. JOHNSON,
Court Administrator/Clerk

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March 17, 2015

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CASE #: 72914-4-I
Concepcion Whittenburge, App. v. State of WA., DSHS, Res.
Snohomish County No. 14-2-04713-2

Counsel:

Enclosed is the ruling of the Commissioner entered today in the above case.

In the event counsel wishes to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a "motion to modify the ruling must be served . . . and filed in the appellate court not later than 30 days after the ruling is filed."

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

c: The Hon. Joseph P. Wilson

enclosure

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CONCEPCION WHITTENBURGE, Appellant, v. WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	)	No. 72914-4-I COMMISSIONER'S RULING DISMISSING APPEAL

This is a judicial review case where appellant Concepcion Whittenburge (deceased) challenged the Department of Social and Health Services' denial of her request for payment for her chosen individual home care provider for future services. The Department filed a motion to dismiss, arguing that the appeal is moot where Whittenburge has died and that her counsel lacks standing to pursue it. In response, Whittenburge's estate filed a motion to substitute her. The estate concedes that the merits of Whittenburge's petition for judicial review became moot when she died. But it argues that this Court can and should vacate the superior court's decision as void, where the court, after finding the case moot, proceeded to reach the merits and affirmed the final agency order. The estate fails to explain how the superior court's decision affects its proprietary, pecuniary, or personal interests. This appeal is moot, and neither Whittenburge's counsel nor her estate has standing to pursue it. The case is dismissed.

FACTS

Whittenburge received state-paid in-home care assistance through Washington's

Medicaid COPES (community options program entry system) program. In June 2012, Whittenburge sought payment for her chosen individual home care provider. The Department denied her request on the ground that the proposed provider was not qualified to provide in-home care services. The provider's personal care contract had been terminated for alleged neglect.

Whittenburge requested an administrative hearing to contest the denial of her chosen individual provider. After a hearing, an administrative law judge affirmed the Department's decision. On Whittenburge's petition for review, the Health Care Authority Board of Appeals (Board) issued a final order affirming the Department's decision.

Whittenburge filed in Snohomish County Superior Court a petition for judicial review of the Board's final order. She requested that the court reverse the Board's final order and grant her choice of individual provider. She made no request for reimbursement for past personal care services rendered.

On November 3, 3014, the superior court heard the parties' argument on Whittenburge's petition for judicial review. During the hearing, Whittenburge's counsel informed the court that Whittenburge died on October 18, 2014. After the hearing, the court issued an order, finding that the issues raised in Whittenburge's petition were moot. But the court also reached the merits and affirmed the Board's final order.

Whittenburge's counsel filed a motion for reconsideration under CR 59(a)(7), arguing that the superior court's order on judicial review is "contrary to law." Counsel also filed a motion to vacate under CR 60(b)(8) ("Death of one of the parties before the judgment in the action") and (9) ("Unavoidable casualty of misfortune preventing the party from prosecuting or defending"). Counsel argued that the order entered after the

court found the case moot is "void as a matter of law."[1] The Department opposed the motions, arguing that Whittenburge's counsel could have withdrawn Whittenburge's petition for judicial review after her death but chose to continue to seek review and requested a decision on the merits. The court denied both motions.

Whittenburge's counsel filed a notice of appeal from the superior court's order on judicial review. The Department filed a motion to dismiss appeal for lack of standing and as moot. In response, Whittenburge's estate, through personal representative, filed a motion to substitute Whittenburge in this appeal. The estate agrees with the Department that "the case was mooted upon [Whittenburge's] death" but argues that the superior court lacked "jurisdiction" to enter an order on the merits and that this Court can and should decide whether the superior court lacked jurisdiction.[2]

DECISION

"A case is moot if a court can no longer provide effective relief."[3] As a general rule, an appellate court will not review a moot case.[4] Both the Department and Whittenburge's estate agree that the merits of Whittenburge's petition for judicial review became moot upon her death. However, the estate appears to argue that the appeal is not moot where it seeks to vacate the superior court's order on judicial review as void. The estate argues that after finding Whittenburge's petition moot, the court lacked jurisdiction to issue an order on the merits. The estate argues that this Court has jurisdiction to decide whether the superior court lacked jurisdiction. The Department argues that the appeal is moot and that the estate lacks standing to pursue it. I agree

[1] CP 13 (emphasis in original).
[2] Response to Motion to Dismiss at 6-8.
[3] In re Marriage of Horner, 151 Wn.2d 884, 891, 93 P.3d 124 (2004).
[4] Horner, 151 Wn.2d at 891.

with the Department that the appeal is moot and the estate lacks standing.

Under RAP 3.2(a), this Court will substitute parties "when it appears that a party is deceased or legally incompetent or that the interest of a party in the subject matter of the review has been transferred."[5] However, under RAP 3.1, only an "aggrieved party" may seek review by this Court.[6] "An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected."[7]

For example, a bankruptcy trustee was not a real party in interest in a plaintiff's personal injury claim and could not substitute as a party under RAP 3.2 where the claim did not pass as an asset to the bankruptcy estate.[8] On the other hand, where a criminal defendant dies after he was sentenced, his "heir or heirs may seek substitution under RAP 3.2 for the purpose of attempting to show that criminal financial penalties imposed on the decedent, other than restitution payable to a victim or victims, would result in an unfair burden on the heirs."[9] In such a case, the criminal defendant's estate "occupies a unique position on appeal," where the "only interests remaining are financial."[10]

Here, Whittenburge's estate concedes that the merits of Whittenburge's petition for judicial review (denial of payment for future services to be provided by her chosen provider) became moot upon her death.[11] In a judicial review case, such as this one, an appellate court sits in the same position as the superior court and directly reviews the

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[5] RAP 3.2(a).
[6] RAP 3.1.
[7] Aguirre v. AT & T Wireless Servs., 109 Wn. App. 80, 85, 33 P.3d 1110 (2001).
[8] See Haslett v. Planck, 140 Wn. App. 660, 664-65, 166 P.3d 866 (2007).
[9] State v. Webb, 167 Wn.2d 470, 477, 219 P.3d 695 (2009).
[10] State v. Devlin, 164 Wn. App. 516, 528, 267 P.3d 369 (2011) (indigent defendant's estate, while entitled to counsel on appeal, is not entitled to counsel at public expense).
[11] Response to Motion to Dismiss at 1 (in response to the Department's argument that the case is moot, the estate "could not agree more on the mootness issue"), at 6 ("the Estate agrees with DSHS that the case was mooted upon Ms. Whittenburge's death").

final agency decision "without regard to the superior court decision."[12] The estate does not explain how its appeal from the superior court's order on undisputedly moot issues (the merits of Whittenburge's petition for judicial review) is not moot. The estate does not explain how the superior court's order substantially affects its proprietary, pecuniary, or personal interests. The estate's mere disagreement with or disappointment over superior court's order does not entitle it to appeal; it must be aggrieved "in a legal sense."[13] The appeal is moot, and to the extent it is not, neither Whittenburge's counsel nor her estate demonstrates their standing. The appeal should be dismissed.

Therefore, it is

ORDERED that the estate's motion to substitute is denied. It is further

ORDERED that the Department's motion to dismiss is granted. This case is dismissed as moot and for lack of standing pursuant to RAP 3.1 and 18.9(c)(2).

Done this 17th day of March, 2015.

Masako Hanagawa
Court Commissioner

[12] Goldsmith v. Dep't of Soc. & Health Servs., 169 Wn. App. 573, 584, 280 P.3d 1173 (2012).

[13] State ex rel. Simeon v. Superior Court, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944).

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Attached please find Petitioner's motion for discretionary review along with exhibits thereto.

Case: Whittenburge v. State of Wash.,DSHS
COA case no.: 72914-4-I

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