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Washington State Supreme Court

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NO. 92028-1

SUPREME COURT OF THE STATE OF WASHINGTON

CONCEPCION WHITTENBURGE,

Petitioner,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
STATE OF WASHINGTON,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER AND RESPONDENT

The Estate of Concepcion Whittenburge appeals the decision of the Court of Appeals dismissing her appeal on the grounds of mootness and lack of standing. The State of Washington, Department of Social and Health Services, (Department), was respondent in the Court of Appeals and is respondent herein.

II. COURT OF APPEALS DECISION

Petitioner Concepcion Whittenburge filed a petition for judicial review of an administrative order issued by the Department. Unfortunately, a few days before the hearing on judicial review, Ms. Whittenburge passed away. After the hearing, the superior court denied the petition for judicial review as moot on its own motion, and alternatively denied it on the merits. The Estate of Ms. Whittenburge appealed the superior court's order. The Commissioner of the Court of Appeals granted the Department's motion to dismiss the appeal and dismissed the appeal as moot and held that neither Whittenburge's counsel nor her estate had standing to pursue the appeal. A panel of the Court of Appeals affirmed. The Court of Appeals was correct in holding that the estate has not shown how the superior court's order substantially affects its proprietary, pecuniary, or personal interests. The Petition for Review to this Court should be denied.

III. RESTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

For the reasons explained below, review is not warranted under RAP 13.4(b). If the Court were to grant review, the following issues would be presented:

1. Was Ms. Whittenburge's petition for judicial review properly dismissed as moot after she passed away because the court could not grant any effective relief?
2. Did the Court of Appeals err in holding that the Estate of Ms. Whittenburge lacked standing to appeal from the superior court's dismissal because the Estate had not shown any proprietary, pecuniary, or personal interest that would be substantially affected by the trial court's dismissal of Ms. Whittenburge's petition for judicial review?
3. If the appeal were not moot and if the Estate had standing, the issue on the merits would be whether the Department had authority to deny payment to Ms. Whittenburge for an individual home care provider where Ms. Whittenburge had suspended and terminated the contract with that provider.

IV. STATEMENT OF THE CASE

In June 2012, Concepcion Whittenburge sought payment for an individual home care provider under Washington's Medicaid COPES (Community Options Program Entry System) Program. CP 43. On July 20, 2012, the Department denied the request for payment because the proposed individual provider¹ was not qualified to provide in-home care services based on character, competence, and suitability. CP 66. Ms. Whittenburge had previously terminated a personal care contract with this provider due to alleged neglect. CP 43. As a result, the Department denied Ms. Whittenburge's new request for payment with that provider. *Id.* Ms. Whittenburge's administrative appeal of the Department's decision was denied when the Washington Health Care Authority Board of Appeals affirmed the Department's decision. CP 44.

On June 25, 2014, Ms. Whittenburge filed a petition for judicial review of the administrative order denying payment. *Id.* Significantly, Ms. Whittenburge asked the superior court to order that the Department pay her selected individual provider for services to be rendered in the future; she made no claim for reimbursement for past personal care services rendered or for a money judgment. CP 78.

¹ The proposed individual provider was Ms. Whittenburg's daughter, Antonia Bryant. Ms. Bryant is not a party to this appeal.

At oral argument on November 3, 2014, Ms. Whittenburge's attorney advised the superior court her client had passed away. The superior court ruled that the issues raised in the petition for judicial review were moot because the Petitioner was deceased and the court could not grant any effective relief. CP 20.

The superior court additionally made findings and conclusions on the merits of the issues raised in the petition in the event an appellate court disagreed that the Petition was moot. CP 20–21. The court concluded the Department had the authority under its rules to deny payment for personal care services. CP 21. The superior court denied the petition for judicial review on the merits. CP 21.

Ms. Whittenburge's attorney moved for reconsideration of that portion of the superior court's order that addressed the merits of the petition for judicial review, and asked that the superior court enter a new order of dismissal based only on the mootness of the petition. CP 19. Ms. Whittenburge's attorney also filed a motion to vacate the order on the same grounds. CP 11–13. On December 4, 2014, the superior court denied both motions. CP 1.

Ms. Whittenburge's attorney appealed the superior court's December 4, 2014, order to the Court of Appeals. The Department moved to dismiss the appeal as moot and for lack of standing. In response, Ms.

Whittenburge's attorney moved to substitute Ms. Whittenburge's Estate (Estate) as a party to pursue the appeal. The Court of Appeals Commissioner denied the Estate's motion to substitute, and granted the Department's motion to dismiss for lack of standing and mootness. A panel of the Court of Appeals denied the Estate's motion to modify the Commissioner's ruling. On August 4, 2015, the petitioner filed a Motion for Discretionary Review with this Court, followed by an amended petition for review on August 24, 2015.

V. ARGUMENT IN OPPOSITION TO PETITION FOR REVIEW

The Estate contends review is appropriate under RAP 13.4(b)(1), RAP 13.4(b)(3), and RAP 13.4(b)(4). Its petition should be denied because the Court of Appeals decision is not in conflict with this Court's case law, the petitioner failed to establish a significant question of constitutional law, and the petition does not raise an issue of substantial public interest.

A. The Court of Appeals' Decision Is Not in Conflict With Any Decision of This Court

The Court of Appeals dismissed the petitioner's appeal because it was moot and the petitioner lacked standing. This Court's decisions directly support the Court of Appeals' determination that the case is moot. An appeal is moot where it presents a purely academic issue and where it

is not possible for the court to provide effective relief. *In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004); *Hart v. Dep't of Soc. & Health Serv.*, 111 Wn.2d 445, 447, 759 P.2d 1206 (1988). As a general rule, the court will not review a moot case. *Horner*, 151 Wn.2d at 891.

Both the Department and the Estate agreed that the petition for judicial review became moot upon Ms. Whittenburge's death. However, the Estate argued that an appeal seeking to vacate the superior court's order was not moot. The Court of Appeals correctly held that the appeal was moot.

The superior court ruled that Ms. Whittenburge's appeal was moot because she died before judgment was entered and because the relief she had requested was entirely prospective. She had asked only that her provider receive payment for services to be provided, not for any past services, and she did not ask for damages. Upon her death, there no longer was a need for provider services and therefore no effective relief that could be provided. The case was moot and the superior court therefore was correct in dismissing it as moot.

All parties agree the original petition for judicial review became moot upon Ms. Whittenburge's death. A moot case should be dismissed where, as here, there is no longer any effective relief that can be provided to the plaintiff or petitioner. *Horner*, 151 Wn.2d at 891. This case does

not present any issue of continuing and substantial public interest that would justify review even though the case is moot. The superior court's alternative ruling is dictum and does not bind any party or create any precedent.

In addition to finding the appeal moot, the Court of Appeals also correctly held that the petitioner lacked standing. Only an aggrieved party may seek review by the appellate court. RAP 3.1. An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected. *Cooper v. City of Tacoma*, 47 Wn. App. 315, 316, 734 P.2d 541 (1987) (citing *Sheets v. Benevolent & Protective Order of Keglers*, 34 Wn.2d 851, 855, 210 P.2d 690 (1949)). *Accord Ferguson Firm, PLLC v. Teller & Assocs.*, 178 Wn. App. 622, 316 P.3d 509 (2013), *review denied*, 180 Wn.2d 1025 (2014); *Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, 152 Wn. App. 572, 216 P.3d 1110 (2009), *review denied*, 168 Wn.2d 1019 (2010).

The Court of Appeals referred to *State v. Webb*, 167 Wn.2d 470, 477, 219 P.3d 695 (2009), when considering whether the Estate was an aggrieved party with a proprietary, pecuniary, or personal right substantially affected by the case's dismissal. In *Webb*, a criminal defendant died after he was sentenced, and the court held that his "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.” *Id.* at 477. *Webb* presents an example of a party with standing to seek review in an appellate court because the defendant’s heirs are substantially affected by the case’s dismissal.

However, as the Court of Appeals recognized, the present case does not present a situation similar to that in *Webb*. The Estate has not made any showing that the proprietary, pecuniary, or personal interests of Ms. Whittenburge’s Estate has been or will be substantially affected. Ms. Whittenburge’s request for relief on judicial review was for reinstatement of her preferred individual caregiver to provide her future care services. Because Ms. Whittenburge is deceased, her claim on judicial review is extinguished and there is no aggrieved party to pursue her claim.²

The Petition for Review should be denied. There is no showing that the Court of appeals decision conflicts with a decision of this Court as required by RAP 13.4(b)(1).

² The petition appears to assert that the Estate is aggrieved because Ms. Whittenburge’s daughter, Ms. Bryant, may have difficulty obtaining future employment as an individual provider because of language in the superior court order. Even if the assertion were true and not mere speculation, and even if the alleged future difficulty in obtaining employment were sufficient to consider Ms. Bryant “aggrieved” under RAP 3.1, they are irrelevant—she is not a party, and *her* asserted employment difficulty does not give the *Estate* standing to appeal *her mother’s* claim.

B. The Petition Does Not Present a Significant Question of Law Under the State or Federal Constitution

The Estate argues that a substantial public interest is presented because due process concerns have been implicated. Amended Petition (Pet.) at 14-16. The petitioner's argument is misguided.

The Estate is correct in stating that our legislature affords adults the right to control decisions regarding their personal medical care, *Welfare of Colyer*, 99 Wn.2d 114, 118, 660 P.2d 738 (1983), and at a minimum, due process requires notice and an opportunity to be heard, *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994); *see also Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974). However, the Estate is incorrect in asserting that the rulings already made in this case somehow allow the Department to strip an adult's right to control personal medical decisions without providing due process protection. The petitioner's assertion is incorrect because an important fact has been confused.

Ms. Whittenburge terminated the personal care contract with the individual care provider—her daughter—because of neglect concerns. She did not terminate a contract with the Department. The Department denied Ms. Whittenburge's subsequent request to begin paying the individual care provider—her daughter—because that provider previously

had a personal care contract suspended and terminated by Ms. Whittenburge because of alleged neglect. Ms. Whittenburge's right to notice and opportunity to be heard were not stripped from her in this situation. She made the decision to fire her daughter, and the Department later supported that decision by denying the payment request.

Ms. Whittenburge was afforded due process protection. She was afforded the right to contest the Department's decision in an administrative hearing, and later filed for judicial review of the resulting administrative order. Her death rendered further proceedings moot, a point the Estate conceded below. Despite the Estate's contentions in its petition, the trial court and the Court of Appeals did not "disrespect our judicial system." Pet. at 14. Rather, the lower courts considered the relevant facts, law, and arguments in reaching their holdings. There is no significant issue implicating due process concerns and therefore no basis for review under RAP 13.4(b)(3)

C. The Petition Does Not Present an Issue of Substantial Public Interest

The petitioner asserts the Court of Appeals' dismissal of the appeal will "change the law to allow courts to enter judgments against a deceased person." Pet. at 14. But there was no judgment against Ms. Whittenburge—the superior court dismissed the appeal as moot. The

Court of Appeals affirmed the dismissal and issued no published decision that could establish any precedent.

The only legal significance that truly can be drawn from the rulings of the lower courts in this case is that an appeal seeking only payment for future services by an individual care provider is rendered moot where the appellant, who wants to receive that care in the future, dies before that care is provided. The dismissal of judicial review on those facts does not create an issue of substantial public interest under RAP 13.4(b)(4).

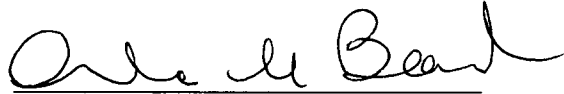
The petitioner's suggestion that this case is of substantial public importance because the due process rights of vulnerable adults otherwise will be "stripped away" is entirely without merit, as explained in the preceding section of this Answer. Review is not warranted under RAP 13.4(b)(4)

VI. CONCLUSION

This Court should deny the petition for review. The Court of Appeals' decision is not in conflict with this Court's precedent and the petition does not raise a substantial public interest nor present a constitutional issue. The Court of Appeals correctly determined that the petitioner's appeal was moot and the petitioner lacked standing.

RESPECTFULLY SUBMITTED this 23 day of September,
2015.

ROBERT E. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Amanda M. Beard". The signature is written in a cursive style with a horizontal line underneath it.

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