

Court of Appeals No. 72914-4-I
COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

CONCEPCION WHITTENBURGE
Petitioner-Appellant

vs.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES

Respondant-Appellee,

OPENING BRIEF OF APPELLANT

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 MAR 13 PM 1:37

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered a judgment against Ms. Whittenburge, after her death, because it lacked authority to do so.

2. The trial court erred when it denied Ms. Whittenburge's motion to vacate the judgment because it was void as a matter of law.

B. INTRODUCTION AND ISSUES RELATED TO ASSIGNMENTS OF ERROR

Ms. Whittenburge passed away while her appeal from the Administrative court was pending. The trial court held that the issue was moot, but entered a judgment against her, from which she cannot appeal.

C. STATEMENT OF THE CASE

The underlying action is an administrative action in which Ms. Whittenburge appealed DSHS' denial of her preferred Individual Provider (IP). CP 15. The administrative law judge and board of appeal judge affirmed the Department's denial of Ms. Whittenburge's choice of IP. On June 25, 2014. Ms. Whittenburge timely appealed the board of appeal judge's final order. CP 15.

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 as moot, but proceeded to determine the merits of the case and

ruled on finding of facts and conclusion of law (“FFCL”). Ms.

Whittenburge’s death precludes her from challenging DSHS’s and the trial court’s FFCL because the issues are moot. CP 20. The trial court denied Whittenburge’s motion to vacate the judgment and to reconsider. CP 14-19; 11-13; and 1. Ms. Whittenburge now appeals to this court.¹

D. ARGUMENT

1. THE TRIAL COURT DID NOT HAVE AUTHORITY TO ENTER A JUDGMENT BECAUSE IT LACKED PERSONAL JURISDICTION AND THE ISSUES WERE MOOT.

a. Personal Jurisdiction

A court cannot adjudicate a personal claim or obligation without personal jurisdiction over that party. *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 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). Jurisdiction can be challenged at any time, including for the first time on appeal. RAP 2.5(a)(1).

Ms. Whittenburge’s death relinquished the court’s personal jurisdiction over her. Therefore, the court had no authority to adjudicate

¹ This court currently has a motion to dismiss and motion to substitute a party pending review. This brief incorporates by reference Appellant’s responses and reply thereto DSHS’s motion to dismiss and answer regarding substitution of a deceased party.

her claim. It necessarily follows that it had no authority to enter a judgment.

b. Mootness

Once the trial court deemed the case was moot, the trial court divested its jurisdiction over the case. CP 20. However, the mootness of this case does not divest this Court of jurisdiction to address this appeal. *Mead Sch. Dist. v. Mead Education Ass'n*, 85 Wn.2d 278, 534 P.2d (1975) is instructive on the concept of jurisdiction. There, an appeal from an order of contempt was made claiming the trial court lacked jurisdiction.

The Supreme Court stated:

"The test of the jurisdiction of a court is whether or not it had power to enter upon the inquiry, not whether its conclusion in the course of it was right or wrong." *State v. Olsen*, 54 Wn.2d 272, 274, 340 P.2d 171 (1959), quoting 12 A.L.R.2d 1059, 1066 (1950).

In most circumstances the application of this principle is relatively straightforward, and the distinction between errors of law and arrogations of power fairly easy to draw. Where it has not been courts have compounded it and fashioned the concept of "jurisdiction to determine jurisdiction." *United States v. United Mine Workers*, 330 U.S. 258, 91 L. Ed. 884, 67 S. Ct. 677 (1947); *United States v. Shipp*, 203 U.S. 563, 51 L. Ed. 319, 27 S. Ct. 165 (1906). These cases hold that a court's order must be obeyed if it had the power to decide whether it was authorized to issue it, even if it is later held that it was not so authorized. They are based on the fundamental premise that when a question of authority is raised, someone must decide it, and the initial decision is going to be made by the forum court itself."

85 Wn.2d at 280-281. Once the trial court decided that the case was moot because of Ms. Whittenburge's death, its jurisdiction ceased and it lacked the power to enter the FFCL. CP 20-22. "A case is moot if a court can no longer provide effective relief." *Harbor Lands LP v. City of Blaine*, 146 Wn. App. 589, 592, 191 P.3d 1282 (2008). Mootness "is directed at the jurisdiction of the court" and may be raised at any time. *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845 (1983). This is because a case can become moot during the time it takes to reach the appellate court. *Hansen v. West Coast Wholesale Drug Co.*, 47 Wn.2d 825, 826-27, 289 P.2d 718 (1955). If a case is moot at the time the court enters judgment, that judgment must be vacated and dismissed as the trial court lacked the jurisdiction to enter the FFCL. *Harbor Lands LP*, 146 Wn. App. at 591. As such, this court has the jurisdiction to determine whether the trial court had jurisdiction to determine whether the trial court had jurisdiction to act on the merits of the underlying case once Ms. Whittenburge passed away. Thus, while the underlying case was mooted at Ms. Whittenburge's death, this Court still has the jurisdiction to address trial court's actions on appeal.

When the trial court heard the case on November 3, 2014, it could no longer provide effective relief. Ms. Whittenburge's underlying complaint asked the court to require DSHS to pay for her IP of choice.

Because Ms. Whittenburge passed away she was no longer in need of an IP. As in *Hansen*, the plaintiff's cause of action became moot while the appeal was pending, so it should have been dismissed. *Hansen*, 47 Wn.2d at 827.

In certain circumstances, a case with an issue that is moot as applied to the party, may still be decided under the public interest exception, but only if the following three factors are met: (1) the issue is public in nature; (2) a determination would provide future guidance to public officers; and (3) the issue is likely to recur. *Hart v. Dep't of Social & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988).

Here, the Order on Petition for Judicial Review does not mention any of the three factors and there is no indication the court considered them. The findings of fact upheld the sufficiency of the evidence, which is determined on a case by case basis and is certainly not a matter of public concern.

DSHS admits no effective relief can be granted and that the case is moot.² CP 4. Also, DSHS argued below that Whittenburge is estopped from arguing that the mootness doctrine applies because her attorney

² In fact, DSHS's attorney opposed the public exception to mootness at oral argument and argued the case was moot; thereafter the trial court deemed the case as moot. CP 2-6. Additionally, DSHS, filed a motion to dismiss with this court on February 17, 2015 based on mootness and lack of standing.

argued that it did not apply during oral arguments. CP 4. However, judicial estoppel bars a party from asserting a position in a court proceeding and then asserting a clearly inconsistent position later or in a different court. Additionally, the principle of judicial estoppel only applies when the prior inconsistent position benefited the litigant or was accepted by the court. *Taylor v. Bell*, No. 70414-1-I (Ct. App.Div. I Dec. 29, 2014). Neither one applied in our case.

The court has applied the public interest exception where “matters of continuing and substantial public interest are involved.” *Sorensen v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). Because the purpose of the exception is to provide guidance for the future, it is logical that the court must make a factual determination on the record whether it considered the three essential factors. There is no evidence on the record that the court applied the public interest exception to the mootness doctrine. Therefore, Whittenburge is not estopped from asserting that once the court found the case was moot, it should have dismissed it.

2. THE SUPERIOR COURT’S JUDGMENT SHOULD HAVE BEEN VACATED BECAUSE IT IS VOID.

Civil Rule 60(b)(8)(9) allows a court to void a Judgment or Order

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or Defending...

Although this civil rule seems to give the court discretion to void a judgment upon the death of a party, it is actually mandatory. This is because a judgment entered without personal jurisdiction is void. *Dike v. Dike*, 75 Wn.2d 1, 7, 448 P.2d 490 (1968). And, as discussed above, the court does not have personal jurisdiction over a deceased person. Ms. Whittenburge was deceased at the time the judgment was entered, so it is void as a matter of law.

Even if this court finds that vacation is discretionary, the judgment should still be vacated because Whittenburge's death prevents her from prosecuting her cause of action. In addition, her attorney cannot appeal an issue the court has deemed moot; she can only challenge its classification as moot and Ms. Whittenburge cannot assist in any decision.

E. WHITTENBURGE IS ENTITLED TO COSTS ON APPEAL

A public assistance applicant or recipient who is aggrieved by a decision of the department is entitled to reasonable attorneys' fees and costs if they prevail on appeal. RCW 74.08.080(3). Whittenburge was a public assistance applicant, as the underlying controversy stems from the department's denial of her chosen IP. If this court vacates the FFCL then

Whittenburge is the prevailing party.

Whittenburge is also entitled to costs and reasonable attorney fees on appeal under RAP 18.9 and CR 11. The Department could have dispensed with this case below by agreeing the FFCL should be vacated and neither party would have prevailed. Instead, it forced Whittenburge to incur unnecessary costs to enforce her rights on appeal. In addition, the Department subsequently filed a motion to dismiss this appeal arguing it is moot. If the Department agrees with Whittenburge that the case was moot when the trial court entered the judgment, then there was no need to incur the expense of an appeal. She is therefore entitled to an award of court costs and reasonable attorney fees.

F. CONCLUSION

Ms. Whittenburge passed away, before the trial court entered any judgment. Upon her death, the court no longer had jurisdiction over her and, therefore, had no authority to adjudicate her claim. Her death also made the case moot. Therefore, the judgment is void as a matter of law and this court should remand the case to the trial court for dismissal and an award for costs and reasonable attorney fees.

DATED this 13th day of March, 2015.

Respectfully Submitted,

GUIDANCE TO JUSTICE LAW FIRM.

Mary C. Anderson

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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 March 13, 2015, I caused the OPENING BRIEF OF APPELLANT to be filed and served upon the Court of Appeals, Division I; and a copy via next day air 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 13th day of March, 2015

Mary C. Anderson

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