NO. 97740-2

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF:

J.W., A.W., AND D.W.

DEPARTMENT'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION AND IDENTITY OF RESPONDENT

The Department of Children, Youth, and Families[1] (Department) respectfully requests this Court to deny D.W.'s[2] Petition for Discretionary Review (Petition). D.W. fails to demonstrate review is justified under RAP 13.4(b). The Court of Appeals opinion concluding D.W.'s case is moot does not conflict with this Court's decision *In re Dependency of K.N.J.*, 171 Wn.2d 568, 582-83, 257 P.3d 522 (2011). Even if the Court were to rule in D.W.'s favor, it would not provide effective relief because the orders terminating his parental rights supersede the underlying dependency matter in this case and are now final. On November 6, 2019, in case No. 97401-2, this Court denied D.W.'s motion to modify the Commissioner's ruling denying review of D.W.'s challenge to the orders terminating his parental rights.

D.W.'s assertions that the Court of Appeals denied him due process are also without merit. D.W.'s case is fact-specific and its application does not raise significant questions of law under the Washington State or United States constitutions, nor does it raise issues of

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[1] On July 1, 2018, the Department of Children, Youth, and Families assumed all powers, duties, and functions of the Department of Social and Health Services pertaining to child welfare services. RCW 43.216.906; *see also* Laws of 2017, ch. 6. To avoid confusion, this brief refers to Washington's public child welfare agency as the "Department."

[2] In order to protect confidentiality, and in compliance with General Rule 31(e) and this Court's October 7, 2019 Perfection Letter, the parties shall be referred to their initials only. No disrespect is intended.

substantial public interest justifying review. D.W.'s motion for discretionary review should be denied.

II. STATEMENT OF RELIEF SOUGHT

The Department respectfully asks the Court to deny D.W.'s Petition for Discretionary Review.

III. COUNTERSTATEMENT OF THE CASE

A. Superior Court Dependency and Termination Proceedings

In October 2014, the Department removed D.W.'s children from his custody and filed dependency petitions alleging the children were dependent because they had no parent capable of caring for them such that they were in circumstances constituting a danger of substantial damage to their psychological or physical development. CP at 2. The basis for the petitions were allegations that D.W. and his wife fatally abused a three-year old child in their care. *Id.*

The juvenile court held a dependency hearing on November 13, 2014, at which D.W. appeared and was represented by counsel. CP at 75-85. On November 20, 2014, D.W. signed a declaration and stipulation to entry of an agreed order of dependency. *Id.* at 67-69. The stipulation contained a preprinted paragraph in which D.W. acknowledged he understood that entry of the agreed order of dependency would constitute an admission that the children were dependent as defined by

RCW 13.34.030. *Id.* at 71. On November 20, 2014, the superior court entered agreed orders finding D.W.'s children dependent pursuant to RCW 13.34.030(6)(c). *Id.* at 84.

In October 2015, the Department petitioned to terminate D.W.'s parental rights to his children. CP 948, 970.

More than two years after entry of the dependency orders, with the assistance of new counsel, D.W. moved under CR 60(b)(11) to vacate the dependency orders, claiming he did not willingly stipulate to dependency due to ineffective assistance of counsel. CP 927-39. The superior court denied the motion to vacate on June 15, 2017. CP 953-54. D.W. timely appealed the superior court's order denying his CR 60(b) motion to vacate the dependency orders (the dependency appeal).

On July 28, 2017, the superior court entered an order terminating D.W.'s parental rights as to all three children. CP 991-96. The court also denied a petition to establish a guardianship. *Id.* D.W. appealed that decision (the termination appeal).

B. Proceedings in the Court of Appeals

D.W. asked the Court of Appeals to consolidate and docket his dependency appeal with his termination appeal for accelerated review under RAP 18.13A. Docketing Ruling at 2, Court of Appeals case no. 51060-0-II (Appendix A). The Court of Appeals denied D.W.'s motion to

consolidate those appeals for accelerated review "[b]ecause CR 60 denials are not included in RAP 18.13A, this consolidated appeal cannot be heard on a motion for accelerated review along with the termination appeals." *Id.* at 3. RAP 18.13A is limited to accelerated review of dependency disposition orders, orders terminating, and dependency guardianship orders. *See* RAP 18.13A(a). The Court of Appeals consolidated D.W.'s appeal of the superior court's CR 60(b) denial with case Nos. 51064-2-II and 51070-7-II under case No. 51060-0-II, which is before this Court in the present case. *Id.* at 1-2.

During the pendency of case No. 51060-0-II, D.W. filed two motions to supplement the appellate record. The court denied the first motion to supplement[3] because "D.W. could have presented the information in [those] documents to the superior court" by June 2017 when he filed his CR 60 motion. Ruling Denying D.W.'s Motion to

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[3] The first motion to supplement requested the addition of "(1) [D.W.'s] 2018 medical records related to legal blindness; (2) a Department of Corrections (DOC) mental health appraisal; (3) a 2012 Social Security Administration (SSA) record referencing a fetal alcohol syndrome (FAS) diagnosis; (4) a June 2018 declaration of Clair Close; (5) guardianship filings dated between December 2016 and February 2017, seeking placement with Christil Englert- Brewer; (6) a June 12, 2017 pre-adoption report for Englert-Brewer prepared by Christina Bitting; (7) the July 14, 2017 testimony of Christina Bitting; and (8) the July 13, 2017 testimony of Englert-Brewer." Appendix B at 1.

Supplement the Record (Appendix B) at 2. For the second motion[4], the court granted the admission of a Report of Proceedings on October 31, 2016, but denied the admission for the remainder of the items with the exception of two, which were "already included in the record." Ruling Granting Motion to Supplement in Part and Denying in Part (Appendix C) at 1, 4.

In its response brief for the dependency appeal the Department relied on *In re K.N.J.* and cited the termination orders, to argue that the findings of fact entered in connection with the termination orders were sufficient to establish dependency, and as a consequence, the motion to vacate the dependency orders was moot. Department's Response to Brief of Appellant (Response Brief) at 8, 12-13, 39. D.W. also cited the termination orders in his briefing, arguing that his appeal was not moot because vacation of the dependency orders would have removed an essential element of termination. Brief of Appellant at 14-15; Reply Brief of Appellant (Reply Brief) at 5-7. Neither party moved to supplement the record with the termination orders and related records.

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[4] The second motion to supplement requested the following: Report of Proceedings (RP) from October 21, 2016; an RP from October 31, 2016; an RP from January 20, 2017; Clerk's Papers (CP) at 712-14; an RP from April 27, 2018; D.W.'s eye records from 1990 and 1991; D.W.'s declaration; a book excerpt on Fetal Alcohol Syndrome (FAS); an American Bar Association Resolution and Report (ABA report); and; a November 7, 2018 ex parte authorization of expert services at public expense. Appendix C at 1.

On April 3, 2019, the Court of Appeals, acting on its own motion, entered a panel order directing the Department to supplement the appellate record with the "Trial Findings, and Order Regarding Termination of Parent-Child Relationship and Denial of a Guardianship Petition (as to Father, D.W. Sr.) filed on July 28, 2017." Order Directing Supplement of Record (Appendix D). The Department supplemented the Clerk's Papers with the termination orders. CP 991-96. D.W. sought discretionary review of that Court of Appeals order. A Commissioner of this Court denied review of the Court of Appeals order to supplement the record with the termination order in case No. 97166-8 on May 28, 2019. D.W. moved to modify the Commissioner's Ruling Denying Review. A panel of this Court denied D.W.'s motion to modify the Commissioner's ruling on August 9, 2019.

On September 4, 2019, in an unpublished opinion, the Court of Appeals ruled that D.W.'s appeal of "the denial of his motion that sought to invalidate the orders of dependency . . . is moot because voiding the dependency order would have no effect on the termination of his parental rights." Unpublished Opinion, filed September 4, 2019 (Appendix E) at 1, 4. D.W. appeals that ruling and, for the first time on appeal, the Ruling Denying D.W.'s Motion to Supplement the Record and Ruling Granting Motion to Supplement in Part and Denying in Part. (Appendices B and C).

On November 6, 2019, in case No. 97401-2, this Court denied D.W.'s motion to modify the Commissioner's ruling denying the motion for discretionary review of the Court of Appeals decision affirming the orders terminating D.W.'s parental rights.

IV. GROUNDS FOR RELIEF AND ARGUMENT

D.W. has not provided a basis for review under RAP 13.4(b). The Court of Appeals opinion concluding that D.W.'s case is moot aligns with this Court's decision *In re K.N.J.*, 171 Wn.2d at 582-83. *K.N.J.* holds that an appellate court can derive a finding of dependency from a termination order's findings of fact. *Id.* Nothing would change if this Court determines the dependency orders were invalid or void because the findings of fact issued in the termination proceeding establish dependency, and the termination proceeding is now final. Furthermore, D.W.'s appeal is particularized and fact-based, and does not involve any issue of substantial public interest warranting review. Consequently, this Court should deny D.W.'s Petition.

D.W.'s assertions that the Court of Appeals denied him due process are without merit. Petition at 8. D.W. vigorously pursued all process available and due to him. His petition for relief to this Court is part of the continuum of due process in review of the decisions by the courts below.

This case is regarding the dependencies of D.W.'s children and it requires consideration of their interests as well as D.W.'s due process rights. Given the passage of time and the children's need for permanency, the remedy available to the Department on behalf of the children through post-judgment relief or a new trial is inadequate. The Court should deny his Petition regarding his claims of due process violations.

A. The Court of Appeals Correctly Concluded D.W.'s Appeal was Moot

The Court should deny D.W.'s Petition because the issues he raises are moot. "A case is moot if a court can no longer provide effective relief." *SEIU Healthcare 775NW v. Gregoire,* 168 Wn.2d 593, 602, 404 P.3d 70 (2010). Nothing would change if this Court determines the dependency orders were invalid or void because the findings of fact issued in the termination proceeding establish dependency. CP at 993; *see In re K.N.J.*, 171 Wn.2d at 582-83. On November 6, 2019, in case No. 97401-2, this Court denied D.W.'s motion to modify the Commissioner's ruling denying the motion for discretionary review of the Court of Appeals' decision affirming the orders terminating D.W.'s parental rights.

The validity of a dependency order does not necessarily affect the validity of a later-issued order terminating parental rights. In *K.N.J.,* the dependency order was void because a judge pro tempore had presided at

the dependency hearing without the consent of the father. *K.N.J.*, 171 Wn.2d at 578. Despite the absence of a valid dependency order, the *K.N.J.* court affirmed the order terminating the father's parental rights because the findings of fact in the termination order[5] established dependency under RCW 13.34.030(6)(c). *Id.* at 582-83. The Court further observed the father was present and represented by counsel at the termination fact-finding hearing. *Id.* at 584. The Court affirmed the termination of the father's parental rights but cautioned its holding was not a license to "skip statutorily required steps" -- its result was based on the unique facts of the case. *Id.*

Here, there is no argument that the dependency order was void. The agreed order was entered by a superior court commissioner without objection. CP at 76, 84. In fact, D.W. appeared at the dependency hearing and was represented by counsel. CP at 75, 85. He stipulated that his children were dependent. *Id.* at 67-69, 71. Relying on D.W.'s stipulation, the superior court found the children dependent under RCW 13.34.030(6)(c). *Id.* at 84. D.W. did not show the dependency order was facially invalid or void prior to or at the time of the termination hearing. CP 927-39; 953-54; 991-96. Without evidence showing the

[5] With the exception of "the termination trial court's finding that K.N.J. [was] dependent because the court simply relied on the void dependency order." *K.N.J.*, 171 Wn.2d at 582.

dependency order was void or voidable, the superior court considering the petition to terminate D.W.'s parental rights found D.W.'s children to be dependent pursuant to RCW 13.34.180(1)(a) by clear, cogent, and convincing evidence in the termination order. CP 993.

Instead of contending that the dependency order was void, D.W. merely argues that it is voidable as the result of an alleged procedural irregularity. More than two years after entry of the dependency order, D.W. moved to vacate, alleging ineffective assistance of counsel. CP 927-39. This is an untimely collateral attack on the dependency order. With the subsequent entry of the termination order, D.W.'s motion to vacate has also become a collateral attack on the termination order, attempting to invalidate the underlying dependency order on procedural grounds. However, *K.N.J.* supports the proposition that the termination findings may support the dependency element of termination despite alleged procedural defects in the dependency proceeding. See *K.N.J.*, 171 Wn.2d at 582-84.

But even if D.W. succeeded in his untimely collateral attack on the dependency order, no court could provide effective relief. The termination order would remain valid, and, as a result, D.W. would no longer be a party to any dependency proceedings. Here, as in *K.N.J.,* the findings of fact issued in the termination proceeding establish dependency. CP at 993;

K.N.J., 171 Wn.2d at 582. Even if this Court were to rule in D.W.'s favor, it would not provide effective relief because the orders terminating his parental rights entered after the denial of his CR 60 motion supersede the underlying dependency matter. *SEIU Healthcare 775NW,* 168 Wn.2d at 597. Consequently, the Court should deny D.W.'s Petition because this case is moot.

B. D.W.'s Petition for Discretionary Review Does Not Raise Significant Questions of Law under the State or Federal Constitutions nor Does it Raise any Issue of Public Interest

Review is not appropriate because D.W. has not demonstrated that the Court of Appeals violated his due process rights nor does his Petition raise issues of substantial public interest.

The essential requirements of procedural due process are notice and an opportunity for a meaningful hearing. *In re Myricks' Welfare*, 85 Wn.2d 252, 254, 533 P.2d 841 (1975). In determining whether a procedure adequately protects a parent's due process rights in a juvenile dependency or termination proceeding, the court balances three factors: (1) the private interests at stake, (2) the government's interest, and (3) the risk that the procedures used will lead to an erroneous decision. *Lassiter v. Dep't of Soc. Servs. of Durham Cy.*, 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

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The parent, the child and the state all share an interest in an accurate and just decision in proceedings to terminate the parent-child relationship. *Lassiter*, 452 U.S. at 27. The child also has "the right to establish a strong, stable, safe, and permanent home in a timely manner." *In re Dependency of A.G.*, 93 Wn. App. 268, 279, 968 P.2d 424 (1998).

Here, D.W. had notice of and participated in the dependency and termination proceedings. *See e.g.*, CP at 12, 20, 35, 67, 69, 75, 85, 116, 130, 133, 135-37, 140-43, 172-76, 340, 833-39, 875-87, 918-21, 927-39, 942-44, 953-65, 991-92. Four different attorneys represented D.W. during the dependency proceedings. CP at 27, 255, 263, 271-75, 291-92, 353-54, 564-65, 567, 757-59, 825. D.W. was represented by a fifth attorney and he was present for the termination proceedings. CP at 787-800, 825, 991-95. During and subsequent to the dependency and termination proceedings in superior court, D.W. vigorously pursued his right to due process through the appellate process. D.W. does not present adequate argument regarding alleged due process violations or other issues of substantial public interest. *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989). The record does not support his assertion that he was denied due process in the superior or appellate court proceedings.

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1. The Court of Appeals did not err in reviewing the termination orders prior to the order denying D.W.'s CR 60(b) motion, nor did it err in denying his motions to supplement the appellate record.

D.W. contends that the Court of Appeals denied him due process because that court reviewed the orders terminating D.W.'s parental rights prior to its review of the superior court's denial of his CR 60(b) motion. Petition at 8-10.

A party requesting discretionary review under RAP 13.4(b) must provide "a direct and concise statement of the reason why" the Court should accept review. RAP 13.4(c)(7). "Lack of a clear legal argument with cited authority is grounds for dismissing an argument on appeal." *In re Dependency of Chubb,* 112 Wn.2d 719, 726, 773 P.2d 851, 854 (1989), (*citing Griffin v. Dep't of Social and Health Services,* 91 Wn.2d 616, 590 P.2d 816 (1979)). D.W. provides no authority or legal argument on *why* the Court of Appeals was obligated to provide accelerated review of a CR 60(b) denial or *how* this violated his right to due process. Petition at 9-10.

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Given that an order denying a CR 60(b) motion is not eligible for accelerated review under RAP 18.13A[6], it is unlikely the Court of Appeals would have reviewed the order denying D.W.'s CR 60(b) motion prior to the termination trial court entering its orders. D.W. filed his CR 60(b) motion on June 6, 2017, one month prior to the trial for termination of his parental rights. CP at 927, 991. The superior court denied D.W.'s CR 60(b) motion on June 15, 2017. CP at 953. D.W. filed his notice of appeal of the order denying his CR 60(b) motion on June 29, 2017. The termination trial started on July 10, 2017. CP at 991. On July 28, 2017, the trial court issued its termination orders, which D.W. appealed the following week. CP 995. During this period, the Court of Appeals had "dismissed nine notices of appeal or discretionary review filed by D.W. with respect to [his] dependency and termination matters." Appendix A at 1-2.

Because RAP 18.13A only allows accelerated review for "[j]uvenile dependency disposition orders and orders terminating parental rights", the Court of Appeals was not obligated to prioritize review of the superior court's denial of the order denying D.W.'s motion for relief

[6] RAP 18.13A, which provides in relevant part: "Juvenile dependency disposition orders and orders terminating parental rights under chapter 13.34 RCW, dependency guardianship orders under chapter 13.36 RCW . . . may be reviewed by a commissioner on the merits by accelerated review as provided in this rule. *Review from other orders entered in juvenile dependency and termination actions are not subject to this rule."* (Emphasis added.)

pursuant to CR 60(b). This Court should decline review because D.W. provides no authority or legal argument explaining how the Court of Appeals infringed his right to due process in scheduling review of his appeals. Petition at 8-10.

D.W. also contends the Court of Appeals "unfairly denied [him] a meaningful opportunity to be heard when it denied his motions to supplement the appellate record with documentation of his disabilities." *Id.* He assigns blame to the "fundamentally unfair procedures employed in the Court of Appeals in this matter [that] deprived [him] of his constitutional due process right to be heard". *Id.*

The court denied D.W.'s first motion to supplement the record because "D.W. could have presented the information in [those] documents to the superior court" by June 2017 when he filed his CR 60 motion. Appendix B at 2. For the second motion, the court granted the admission of a Report of Proceedings, but denied the admission for the remainder of the items with the exception of two, which were "already included in the record." Appendix C at 1, 4.

D.W.'s due process claim as to those rulings is disingenuous. He used the Rules of Appellate Procedure to file a motion requesting supplementation. Appendices B and C. D.W. further asserted his right to due process by filing a motion to modify the commissioner's January 22,

2019 ruling. Order Denying Motion to Modify (Appendix F); Appendix C. Here, D.W. does not present argument with cited authority on exactly how the Court of Appeals denied him due process regarding these two orders. Petition at 10. This Court should deny his Petition. *Chubb,* 112 Wn.2d at 726.

2. The Court of Appeals appropriately exercised its discretion to order supplementation of the record with the termination orders because they were necessary to evaluate argument made by the parties

D.W. contends the Court of Appeals denied him an opportunity to be heard regarding that court's order directing supplementation of the appellate record with the order terminating his parental rights. Petition at 12-13. He relies on language contained in the Court of Appeal's January 22, 2019 Ruling Granting Motion to Supplement in Part and Denying in Part, which provided that "no further motions to supplement will be considered by [the] court unless the moving *party* presents extraordinary circumstances." Appendix C at 4 (emphasis added). However, the Court of Appeals is not a party to the proceeding; it presides over the parties to the proceeding and retains wide discretion in determining which issues must be addressed to properly decide a case on appeal. *Clark Cty. v. W. Wash. Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 146–47, 298 P.3d 704 (2013).

Here, the Court of Appeals directed the Department to add the termination orders to the appellate record because both parties referenced them in their briefing. *See* Brief of Appellant at 14-15; Response Brief at 8, 13, 39; Reply Brief at 6. The court had to consider those orders to determine whether the issue regarding dependency raised by D.W. was moot. Adding the order to the appellate record was appropriate under RAP 9.11 and within the court's "wide discretion in determining which issues must be addressed in order to properly decide [D.W.'s] case on appeal." *W. Wash. Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d at 146-47.

An appellate court has authority to direct that additional evidence on the merits of the case be taken before the decision of a case on review if:

> (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

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RAP 9.11(a). "Moreover, [the appellate court] may also waive the requirements of RAP 9.11 if the new evidence would serve the ends of justice." *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 937, 206 P.3d 364 (2009) (citing RAP 1.2(c)).

Nothing in RAP 9.11 requires the court to articulate its basis for taking additional evidence on the merits of a case. *See* RAP 9.11. Because the termination orders were necessary for the court to evaluate whether D.W.'s appeal is moot, their addition to the record was appropriate and consistent with the court's authority pursuant to RAP 9.11. Accordingly, the Court of Appeals did not err in ordering the termination orders' addition to the appellate record. Its decision to do so did not deprive D.W. of his right to due process.

Here, the Court of Appeals properly exercised its authority under RAP 9.11(a) to take additional evidence on the merits of whether D.W.'s underlying claim regarding dependency was moot. The Court of Appeals needed the termination orders to fairly resolve that issue. RAP 9.11(a)(1). Those orders were relevant to the court's decision of the issues under review because both parties referenced them in their briefings. RAP 9.11(a)(2). Based on the procedural facts, it was equitable to excuse the Department and D.W.'s failure to present the orders to the trial court. RAP 9.11(a)(3). Even if the parties had not raised the issue of mootness,

the court could have raised the issue sua sponte. *See In re Det. of C. W.*, 105 Wn. App. 718, 723, 20 P.3d 1052 (2001), *aff'd*, 147 Wn.2d 259 (2002); RAP 12.1(b).

D.W. cites RAP 12.1(b) to assert he "was denied the opportunity to respond to the Court's *sua sponte* motion to supplement the record or to present argument related to mootness or the final orders entered in the termination matters." Petition at 13-14. D.W. cites no authority for the proposition that an appellate court, or any other forum, is required to make a motion for a matter under its jurisdiction and D.W. *did* present argument related to mootness in his reply brief to the Department's Response.

D.W. further exercised his due process rights by submitting a motion for discretionary review of the order to supplement the record. That was docketed in this Court under case No. 97166-8. The Commissioner of this Court denied D.W.'s motion for discretionary review. *See* Ruling Denying Review, Case No. 97166-8. He further exercised his due process rights through a motion to modify the commissioner's ruling through a panel of this Court, which affirmed the commissioner's ruling denying review. *See* Order Denying Motion to Modify, Case No. 97166-8. D.W.'s claim that he was denied due process on this issue is not supported by the record.

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V. CONCLUSION

Based on the foregoing, the Department respectfully requests that this Court deny the Appellant's Petition for Discretionary Review.

RESPECTFULLY SUBMITTED this 12 day of November, 2019.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a true and correct copy of the foregoing document upon the persons indicated below as follows:

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☒ **E-Service Via the Court's E-filing Portal**

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 12 day of November 2019, at Tumwater, Washington.

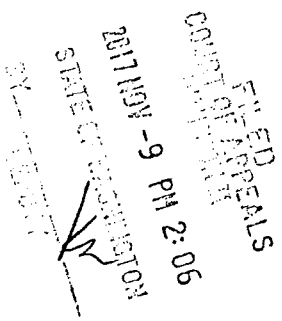
Dawn Walker

Dawn Walker, Legal Assistant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II



IN THE MATTER OF THE WELFARE OF:

J.W., A.W., D.W., Jr.,

Minor children.

Consol. Nos. 51060-0-II
51064-2-II
51070-7-II

DOCKETING RULING

D.W. responds to this court's October 13, 2017 notation ruling, which asked the parties to address whether notices of appeal or discretionary review related to superior court cause numbers 14-7-00377-0, 14-7-00378-9, and 14-7-379-6 (the dependency matters) and superior court cause numbers 15-7-00411-21, 15-7-00410-2, and 15-7-0409-21 (the termination matters) remain unfiled.

This ruling dockets the matters identified in paragraph 2.2 of D.W.'s October 20, 2017 response and addresses the status of the June 29, 2017 notices of discretionary review of the superior court court's denial of his CR 60 motion.

Procedural History

On August 24, 2017, this court dismissed nine notices of appeal or discretionary review filed by D.W. with respect to the dependency and termination matters. *See* separately consolidated anchor COA Nos. 50230-5-II, 50640-8-II, and 50610-6-II. On

September 11, 2017, D.W. timely moved to modify the August 24, 2017 dismissal of consolidated COA No. 50230-5-II, and on September 22, 2017, D.W. filed a second motion to modify covering all three sets of the August 24th dismissals. *See* consolidated COA Nos. 50230-5-II, 50640-8-II, and 50610-6-II; *see also* Clerk's Spindle, Notation Ruling Oct. 13, 2017 at §§ (2) and (3). On September 28, 2017, this court withdrew its August 24, 2017 dismissal rulings for all three sets of consolidated cases due to clerical docketing errors identified in the September 22, 2017 motion to modify.

Docketing Resolution

On October 13, 2017, this court issued a notation ruling. Relevant to the present matters, D.W. responded and informed this court that two sets of notices of discretionary review that he filed in the dependency cause numbers on June 29, 2017, have not yet been assigned appellate docket numbers.

The June 29, 2017 notices of discretionary review of CR 60 denials in the dependency matters are assigned the docket numbers set out in the caption of this ruling. They are consolidated under anchor COA No. 51060-0-II, and are docketed as *notices of appeal*, not notices of discretionary review.

D.W. asks for consolidated COA No. 51060-0-II to be docketed and consolidated with his appeal of the termination orders currently pending under consolidated anchor COA No. 50710-2-II, as a motion for accelerated review under RAP 18.13A. In its response to D.W.'s objections to the October 13, 2017 docketing ruling, the Department of Social and Health Services (Department) suggests that these appeals should not be calendared because this issue can be addressed in the appeal of the termination orders. *See* consolidated COA No. 50710-2-II.

Because CR 60 denials are not included in RAP 18.13A,[1] this consolidated appeal cannot be heard on a motion for accelerated review along with the termination appeals. Thus, it cannot be consolidated with the termination appeals. Accordingly, it is hereby

ORDERED that COA Nos. 51060-0-II, 51064-2-II, and 51070-7-II are docketed and consolidated under anchor COA No. 51060-0-II. It is further

ORDERED that the parties' requests to consolidate these appeals with COA No. 50710-2-II are denied.

A perfection notice will issue in due course.

DATED this 9th day of November, 2017.

Aurora R. Bearse
Court Commissioner

cc: Danny Wing, Pro Se
Hailey L. Landrus
Erin E. Lococq
Christopher Desmond
Nash A. Callaghan
Martin E. Wycoff
Adam Ballout
Courtney V. Lyon
Christopher A. Baum, GAL
Hon. Tracy Loiacono, Pro Tem
Hon. James Lawler

[1] RAP 18.13A(a) provides, in relevant part:

> Juvenile dependency disposition orders and orders terminating parental rights under RCW 13.34, and dependency guardianship orders under RCW 13.36, may be reviewed by a commissioner on the merits by accelerated review as provided in this rule. *Review from other orders entered in juvenile dependency and termination actions are not subject to this rule.*

(Emphasis added.)

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN THE MATTER OF THE WELFARE OF:	Consol. Nos. 51060-0-II 51064-2-II 51070-7-II
J.W., A.W., and D.W., Minor children.	RULING DENYING D.W.'S MOTION TO SUPPLEMENT THE RECORD

D.W. moves to supplement the record with: (1) 2018 medical records related to legal blindness; (2) a Department of Corrections (DOC) mental health appraisal (which the Department states is already in the record at Clerk's Papers (CP) at 869-73); (3) a 2012 Social Security Administration (SSA) record referencing a fetal alcohol syndrome (FAS) diagnosis; (4) a June 2018 declaration of Clair Close; (5) guardianship filings dated between December 2016 and February 2017, seeking placement with Christil Englert-Brewer; (6) a June 12, 2017 pre-adoption report for Englert-Brewer prepared by Christina Bitting; (7) the July 14, 2017 testimony of Christina Bitting; and (8) the July 13, 2017 testimony of Englert-Brewer. RAP 9.11(a).

D.W. contends that the documents are necessary for his appeal of the superior court's denial of his CR 60 motion to vacate dependency orders. For example, he believes that his legal blindness and FAS are material to any determination whether his counsel was ineffective and whether he validly agreed to the dependencies in 2014. He also contends that he had relatives who were able to become guardians for his children and, therefore, the dependencies were unnecessary. The Department objects. It primarily argues that D.W. "provides no argument that it is equitable to excuse his failure to provide the additional evidence in June 2017" when he filed his CR 60 motion. Resp. to D.W.'s Mot. to Supp. the Record at 1.

Upon review of the Department's objection, this court agrees with the Department that by June 2017, D.W. could have presented the information in these documents to the superior court. *See* CR 60(e)(1). It also concludes that that D.W. does not explain why it would be equitable to excuse his failure to provide this information to the superior court in June 2017. RAP 9.11(a)(3). First, the guardianship filings and the SSA record were created before June 2017. Second, the medical document dated after 2018—the 2018 medical record related to legal blindness—references that D.W. saw an optometrist in 2015. In addition, the dependency court knew of D.W.'s visual impairments. Resp. to D.W.'s Mot. to Supp. the Record at 6 (citing Clerk's Papers). Finally, this court agrees with the Department that "[i]nformation about the availability of Claire Close and the Englert-Brewers in 2014" as placement options would have also been known by D.W. by at least the summer of 2017, if not much earlier, as shown by the late 2016 and early 2017 guardianship filings related to Englert-Brewer and the fact that Close's declaration

largely describes events that occurred in 2014. Resp. to D.W.'s Mot. to Supp. the Record at 8.

Further, many of the documents are duplicative or irrelevant. *See* RAP 9.11(a)(1) and (2). For example, the SSA document states that D.W.'s visual impairments do not amount to a disability. The DOC mental health appraisal, which is already in the record, notes a prior FAS diagnosis. The SSA document also notes that D.W. claimed disability due, in part, to FAS, but it denied his disability claim. D.W.'s Mot. to Supp. the Record, Appendix 2 at 7 (mentioning a 2011 diagnosis). The 2018 medical records are of little assistance in determining D.W.'s visual abilities in 2014. The Close declaration centers on events that occurred in 2014. It also mentions that D.W. had identified Englert-Brewer as a potential caregiver as early as 2014. And the 2017 pre-adoption report and related testimony regarding Englert-Brewer provides little insight into whether she was a custodian who was capable and available to care for the children in 2014. And, as previously discussed, D.W. could have brought the 2014 availability of Close or Englert-Brewer to the superior court's attention by June 2017. For these reasons, it is hereby

ORDERED that D.W.'s motion to supplement the record is denied.

DATED this 11th day of December, 2018.

Aurora R. Bearse
Court Commissioner

cc: Hailey L. Landrus
Christopher Desmond
Courtney V. Lyon
Karen S. Small

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN THE MATTER OF THE DEPENDENCY OF:

J.W., A.W., and D.W.,

Minor children.

Consol. Nos. 51060-0-II
51064-2-II
51070-7-II

RULING GRANTING MOTION TO SUPPLEMENT IN PART AND DENYING IN PART

D.W. filed a second motion under RAP 9.10 or RAP 9.11 to supplement the record on appeal. The motion is granted in part and denied in part.

ANALYSIS

D.W. moves to add the following materials to the record on appeal:

1. A Report of Proceedings (RP) from October 21, 2016;
2. An RP from October 31, 2016;
3. An RP from January 20, 2017;
4. Clerk's Papers (CP) at 712-714;
5. An RP from April 27, 2018;
6. D.W.'s eye records from 1990 and 1991;
7. D.W.'s declaration;
8. A book excerpt on Fetal Alcohol Syndrome (FAS);
9. An American Bar Association Resolution and Report (ABA report); and
10. A November 7, 2018 ex parte authorization of expert services at public expense.

The Department of Children, Youth, and Families (Department) does not object to item (2). So this court grants D.W.'s request to supplement the record with the October 31, 2016 RP.

The Department states that items (1) and (3) are already part of the record on appeal. No further action from the court is needed on these documents.

It opposes supplementation with the other records. But D.W. contends that the April 27, 2018 RP should be added to the record on appeal because it defeats the Department's argument that the superior court ruled before on the issue whether one of D.W.'s prior counsel (Brian Gerhart), was ineffective. He contends that the April RP shows that the court addressed only the effectiveness of a different counsel (Petersen).

The Department responds that it did not rely on this hearing in its response brief. It adds that this transcript does not show whether the superior court's previous ruling on ineffective assistance of counsel (IAC) included Gerhart and at the April hearing because the superior court did not explain which attorney was covered by its prior IAC order. This court agrees that because the Department did not rely on this hearing and because the only information about the scope of a previous IAC decision was argument presented by D.W.'s counsel and not the superior court's decision, this transcript is not needed to resolve fairly any issues on review. RAP 9.11(a)(1).

D.W. argues that his childhood eye records show that he had significant visual impairments. The Department responds that the eye records from D.W.'s childhood are not needed to resolve the issues on review because they have minimal probative value about his adult visual capabilities. And it is not equitable to excuse D.W.'s failure to

provide this to the superior court because they existed as of the time he filed his CR 60 motion. This court agrees. RAP 9.11(a)(1) and (3).

D.W. asserts that his declaration is necessary because it describes his visual and intellectual disabilities. The Department argues that D.W.'s declaration contains much information not relevant to his CR 60 appeal and, like the eye records, conveys information known to D.W. when he moved in the superior court. This court agrees. RAP 9.11(a)(1) and (3).

D.W. believes the FAS book excerpt and the ABA report show how affected individuals have a "critical need for competent legal counsel." Second Mot. to Supp. at 8. In response, the Department argues that the FAS book excerpt and the ABA report are irrelevant because D.W. has never been formally diagnosed with FAS. So generic FAS information is of limited utility and is not needed to fairly resolve the case. And because the book was published in February 2016 and the ABA report came out in August 2012, D.W. could have submitted it to the superior court. This court agrees. RAP 9.11(a)(1) and (3).

Finally, D.W. contends that the ex parte order shows the court's "commitment to individuals with FAS involved in the court system." Second Mot. to Supp. at 8. The Department responds that an ex parte order authorizing the expenditure of public funds "issued in a case with a different factual record and decided under criminal legal standards is not relevant to the trial court's exercise of discretion in denying D.W.'s CR 60 motion in this civil proceeding." Resp. to Second Mot. to Supp. at 7. This court agrees. RAP 9.11(a)(1) and (2).

Because this appeal is fully briefed, to prevent additional delay no further motions to supplement will be considered by this court unless the moving party presents extraordinary circumstances. RAP 18.8(b); RAP 7.3. Accordingly, it is hereby

ORDERED that D.W.'s motion to supplement the record with an RP from October 31, 2016 (item (2)), is granted. It is further ordered that the remainder of his motion to supplement is denied but items (1) and (3) are already included in the record.

DATED this 22nd day of January, 2019.

Aurora R. Bearse
Court Commissioner

cc: Hailey L. Landrus
Courtney V. Lyon

APPENDIX D

Filed
Washington State
Court of Appeals
Division Two

April 3, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Dependency of: J.W., A.W., and D.W. Minor Children.	No. 51060-0-II consolidated with Nos. 51070-7-II and 51064-2-II ORDER DIRECTING SUPPLEMENT OF RECORD

The court on its own motion has determined that the record in this case should be supplemented. Respondent Department of Children, Youth, and Families is ordered to designate as clerk's papers for this matter the Trial, Findings, and Order Regarding Termination of Parent-Child Relationship and Denial of a Guardianship Petition (as to Father, D.W. Sr.) filed on July 28, 2017, in Lewis County Superior Court Cause Numbers 15-7-00409-21 (17-7-00066-21), 15-7-00410-21 (17-7-0067-21), and 15-7-00411-21 (17-7-00070-21). Respondent shall file with the trial court clerk a designation of clerk's papers within five days of the date of this order.

IT IS SO ORDERED.

PANEL: Jj. Maxa, Melnick, Sutton.

FOR THE COURT:

Maxa, C.J.
Chief Judge

APPENDIX E

Filed
Washington State
Court of Appeals
Division Two

September 4, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Dependency of: J.W., A.W., and D.W., Jr. Minor Children.	No. 51060-0-II consolidated with No. 51070-7-II and No. 51064-2-II UNPUBLISHED OPINION

MELNICK, J. — DW, the father of three minor children, appeals the denial of his motion that sought to invalidate an order of dependency. DW makes numerous arguments on appeal. Because we conclude that the case is moot, we affirm.

FACTS

In 2014, after conferring with his lawyer, DW signed a declaration and stipulated to the entry of an agreed order of dependency. The trial court then entered an agreed order of dependency as to his children: JW, AW, and DW, Jr.

Approximately three years later, DW filed a motion to vacate the agreed order of dependency. The motion alleged that he had received ineffective assistance of counsel in 2014 when he agreed to the order of dependency. The court denied the motion, and DW filed this timely appeal. He raises numerous issues.

Subsequently, after a trial, the court terminated DW's parental rights. To establish dependency as an element of termination, the court relied on the 2014 agreed order of dependency. The court also entered the following findings of fact:

> 5. . . . [DW] suffers from a mental condition[1] that is not likely to change and is not amenable to treatment. As a result of this mental condition, [DW] has no active conscience and is manipulative for his own ends. He is manipulative, even when it is not in the three children's best interest.
>
> 6. As a result of his mental condition, and his untreated chemical dependency issues, [DW] is not currently fit to parent [the three children].
>
> 7. As a result of his sentence, [DW] is also not available to parent his children. . . .
>
> 8. . . . [DW's] mental condition is not likely to change for several decades. Accordingly, offering [DW] additional services would be futile.
>
> 9. . . . [T]here is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future.

Clerk's Papers (CP) at 993.

ANALYSIS

The Department of Children, Youth, and Families (the Department) argues that under *In re Dependency of K.N.J.*, 171 Wn.2d 568, 257 P.3d 522 (2011), DW's appeal is moot. We agree.

"A case is moot if a court can no longer provide effective relief." *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 602, 229 P.3d 774 (2010). "The general rule is that moot cases should be dismissed." *State v. Cruz*, 189 Wn.2d 588, 597, 404 P.3d 70 (2017). "'The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.'" *City of Sequim v. Malkasian*, 157 Wn.2d 251, 259, 138 P.3d 943 (2006) (quoting 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.3, at 261 (2d ed. 1984)).

[1] The court found that DW was a sociopath.

Here, we decide if the case is moot based on whether invaliding the order of dependency, the relief DW seeks, provides him any effective relief because his parental rights have been terminated.

In order to terminate the parent-child relationship, the State must prove, among other elements, "[t]hat the child has been found to be a dependent child." RCW 13.34.180(1)(a). Each element "must be proved by clear, cogent, and convincing evidence." *K.N.J.*, 171 Wn.2d at 576-77.

A "dependent child" is any child who:

> (a) Has been abandoned;
> (b) Is abused or neglected as defined in chapter 26.44 RCW by a person legally responsible for the care of the child;
> (c) Has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development; or
> (d) Is receiving extended foster care services, as authorized by RCW 74.13.031.

RCW 13.34.030(6).

In *K.N.J.*, a father appealed the trial court's termination of his parental rights. 171 Wn.2d at 573. The father argued that the trial court never established dependency because the order of dependency was void. *K.N.J.*, 171 Wn.2d at 574, 578. Thus, the father argued that the trial court improperly terminated his parental rights because the termination improperly relied on a void order of dependency. *K.N.J.*, 171 Wn.2d at 574.

The court agreed with the father that the order of dependency was void. *K.N.J.*, 171 Wn.2d at 578. Consequently, the court recognized that, to uphold the finding of termination, it could not "rely on the termination trial court's finding that [the child was] dependent because the court

simply relied on the void dependency order." *K.N.J.*, 171 Wn.2d at 582. Nonetheless, the court affirmed the termination because independent findings of fact entered at the termination hearing sufficiently established the child's dependency by clear, cogent, and convincing evidence. *K.N.J.*, 171 Wn.2d at 582, 584-85.

Because dependency is an element of termination, the court in *K.N.J.* allowed the father to challenge the termination of his parental rights by challenging the previously issued order of dependency. 171 Wn.2d at 574. However, the court in *K.N.J.* also recognized that if independent findings of fact at the termination trial established dependency by clear, cogent, and convincing evidence, then invalidating the order of dependency provided the father no relief. 171 Wn.2d at 582, 584.

Here, independent findings of fact establish dependency. Following the termination of DW's parental rights, the trial court entered the following findings of fact: "[DW] suffers from a mental condition that is not likely to change and is not amenable to treatment"; "[DW] has no active conscience and is manipulative . . . even when it is not in the three children's best interest"; "[a]s a result of his mental condition, and his untreated chemical dependency issues, [DW] is not currently fit to parent [the three children]"; "[a]s a result of his sentence, [DW] is . . . not available to parent his children"; and "[DW's] mental condition is not likely to change for several decades." CP at 993.

The trial court's findings show, by clear, cogent, and convincing evidence, that DW is not capable of adequately caring for his children. *See* RCW 13.34.030(6). Accordingly, DW's appeal is moot because voiding the dependency order would have no effect on the termination of his parental rights.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Maxa, C.J.

Sutton, J.

APPENDIX F

Filed
Washington State
Court of Appeals
Division Two

February 12, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Welfare of: J.W., A.W., and D.W., Minor children.	Consol. Nos. 51060-0-II 51064-2-II 51070-7-II ORDER DENYING MOTION TO MODIFY

Appellant father, Mr. D.W., moves to modify a Commissioner's ruling dated December 11, 2018, in this case. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Maxa, Melnick

FOR THE COURT:

Maxa, C.J.

MAXA, C.J.

SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE

November 12, 2019 - 2:32 PM

Transmittal Information

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Appellate Court Case Title:	In re the Dependency of: J.W., A.W. & D.W.
Superior Court Case Number:	14-7-00377-0

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