SUPREME COURT NO. 97740-2
COURT OF APPEALS No. 51060-0-II (Cons.)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE WELFARE OF J.W., A.W., and D.W., Jr., Respondent,

v.

D.W., Appellant/Movant

PETITION FOR DISCRETIONARY REVIEW

Hailey L. Landrus, WSBA #39432
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A. IDENTITY OF PETITIONER

D.W. (Father), through his appointed appellate counsel of record, Hailey L. Landrus of Stamper Rubens, P.S., seeks review of the decisions designated in Part B.

B. CITIATION TO COURT OF APPEALS DECISION

Mr. D.W. requests review of the following rulings by the Court of Appeals, Division II:

1. *Ruling Denying D.W.'s Motion to Supplement the Record* dated December 11, 2018 (**Appendix A**);
2. *Ruling Granting Motion to Supplement in Part and Denying in Part* dated January 22, 2019 (**Appendix B**);
3. *Order Directing Supplement of Record* dated April 3, 2019 (**Appendix C**); and
4. *Unpublished Opinion* dated September 4, 2019, which affirms an order denying a CR 60 motion to vacate as moot (**Appendix D**).

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals *Unpublished Opinion* conflicts with the Supreme Court's decision in *In re Dependency of K.N.J.*, 171 Wn.2d 568, 257 P.3d 522 (2011)? RAP 13.4(b)(1), (4).

2. Whether the Court of Appeals *Unpublished Opinion* involves a significant question of law under the Constitution of the State of Washington when Mr. D.W. was deprived of his due process rights? RAP 13.4(b)(3).
3. Whether Mr. D.W. was denied his constitutional due process rights throughout the proceedings at the Court of Appeals when it delayed opening the appeal and denied Mr. D.W. a fair opportunity to be heard? RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

In October 2014, the State filed dependency petitions and removed Mr. D.W.'s three children from his custody. A Dependency fact finding hearing was called before Commissioner Mitchell on November 20, 2014. RP (11/20/2014) 22. The Department represented that the parties were prepared to present agreed orders that no parent or guardian was available to parent the children. RP (11/20/2014) 22.

In fact, Mr. D.W. had told Attorney Gerhart that he did not agree to dependency and that he had family members who could take custody of his children. CP 681-82, 937. However, Mr. D.W. was induced into capitulating to a stipulated dependency finding after Attorney Gerhart misrepresented to Mr. D.W. that it did not matter if relatives were

available to take custody of his children (through guardianship) and that, at a contested dependency fact-finding hearing, Mr. D.W. could not invoke his Fifth Amendment right against self-incrimination if the Department forced him to testify and asked him about the facts underlying the criminal charges against him. CP 681-82, 937. Relying upon counsel's representations and at his direction, Mr. D.W. not only signed an agreed dependency finding but also stipulated to facts alleged in the Department's Petition instead of declining to admit the Department's allegations like he did at the shelter care hearing. CP 76.

Mr. D.W. was not notified of all of his rights even though a dependency finding carries far more serious consequences than a shelter care finding. CP 937. Despite a contrary written representation by Attorney Gerhart that he had read the parent's rights to Mr. D.W., who is visually impaired and legally blind, even Attorney Gerhart admitted in open court that he only "went through Mr. [D.W.]'s right to a contested hearing on the fact-finding and his right to have an attorney present at all stages." RP (11/20/2014) 24. Prior to entry of the dependency order in this matter, Commissioner Mitchell did not confirm that Mr. D.W. knowingly and willingly stipulated and agreed to the dependency order, without duress and without misrepresentation. RP (11/20/2014) 22-29.

Instead, she accepted the stipulation without question and focused on ensuring that Mr. D.W. had no contact with his children. *Id.* at 27-29.

Around March 2016, Mr. D.W. discovered that Mr. Gerhart had incorrectly advised him about his rights. *See, e.g.,* CP 280, 313-19. On or about March 3, 2016, Mr. D.W. informed the Court that Attorney Gerhart had failed to obtain discovery from the Department, failed to answer the Department's Petition, and failed to protect or address his rights. CP 313-319. Mr. Gerhart promptly withdrew as Mr. D.W.'s attorney on March 8, 2016. CP 213. Three additional attorneys, Matthew Kuehnel, Ronnie Soriano, Jr., and Pier Petersen were each appointed to represent Mr. D.W. between March 8, 2016 and March 1, 2017. CP 213, 255, 564, 567, 766. Mr. D.W. asked his attorneys to move to vacate the dependency orders. CP 681-82, 687-88, 698, 707; *accord* CP 273. But none of these attorneys moved to vacate the dependency orders, although at least one court-appointed attorney (Pier Peterson) had promised to do so. CP 688.

In an effort to assist Ms. Peterson with the anticipated motion to vacate the shelter care order and the stipulated dependency and disposition orders, Mr. D.W. filed a declaration in support of the anticipated motion to vacate on December 1, 2016. CP 578-79. Mr. D.W. maintained that he did not knowingly or voluntarily agree to any finding of dependency because he was not advised of his legal rights and his legal counsel

provided ineffective assistance by rendering incompetent legal advice regarding the invocation of his Fifth Amended right against self-incrimination at the dependency fact-finding hearing. CP 579.

It was not until Attorney Christopher Desmond was appointed to represent Mr. D.W. that *Father's Motion to Vacate the Dependency Order* was filed. CP 927-35. That motion urged the Court to vacate the dependency order because of prior counsel's ineffective assistance, including failure to interview witnesses and misrepresentation regarding Mr. D.W.'s Fifth Amendment right to remain silent. CP 927-35.

Accompanying the motion was Mr. D.W.'s declaration and a declaration by a dependency law attorney, Mackenzie Sorich. CP 936-39. Ms. Sorich's declaration stated that, when representing a parent facing criminal charges, the attorney must be careful not to waive the client's legal rights and protections, including helping the client invoke his Fifth Amendment right to remain silent, negotiate alternate bases for entering an agreed order of dependency, and/or seek to continue the dependency trial until the conclusion of the criminal proceedings. CP 938-39. The Department and GAL opposed but produced no evidence in response to Mr. D.W.'s motion. CP 813-14, 947-52.

After the parties argued Mr. D.W.'s motion under CR 60(b)(11) under the *Strickland* standard for ineffective assistance of counsel, the trial

court denied Mr. D.W.'s motion on the grounds that Mr. D.W. would not have prevailed on the merits if the order was vacated; (2) there is no evidence besides Mr. D.W.'s statement; and (3) the motion was untimely. CP 953; RP (06/15/2017) 159-67. An *Order on CR 60* was entered June 15, 2017. CP 953-54. Mr. D.W. timely appealed on June 29, 2017. The Court of Appeals did not open a case for this appeal until November 9, 2017 – five months after Mr. D.W. appealed. *Washington State Court of Appeals Division Two Scheduling Letter* dated November 17, 2017 (attached as **Appendix E**).

During the proceedings at the Court of Appeals, Mr. D.W. moved on October 8, 2018, and on December 10, 2018, to supplement the dependency record on appeal with various records from the termination proceedings concerning his children as well as proof of Mr. D.W.'s visual impairment and Fetal Alcohol Syndrome diagnosis. The first motion was denied on December 11, 2018, and the second motion was granted in part on January 22, 2019, allowing the addition of one report of proceeding from the above-referenced termination proceedings dated October 31, 2016, where Mr. D.W. notified Judge Lawler a second time of his affidavit of prejudice against him and where the trial court appointed Mr. D.W. counsel for the dependency proceedings. The Court of Appeals' January 22, 2019, ruling states, "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."

Then, on April 3, 2019, without notice or explanation, the Honorable Chief Judge Bradley A. Maxa issued an *Order Directing Supplement of Record*, directing the Department to designate the Trial, Findings, and Order Regarding Termination of Parent-Child Relationship and Denial of a Guardianship Petition filed on July 28, 2017, in Mr. D.W.'s parental rights termination proceedings within five days of the date of the order. The Department timely complied with the Court's order, and the additional clerk's papers were filed with the Court soon thereafter. The dependency appeal was not on an accelerated review track and was set on the Court of Appeals' May 13, 2019, non-oral argument docket.

Mr. D.W. moved this Court to accept interlocutory discretionary review of the Court of Appeals' *Order Directing Supplement of Record* under Supreme Court Cause No. 97166-8. After oral argument, Supreme Court Commissioner Michael Johnston denied the motion for discretionary review on May 28, 2019, and a motion to modify that decision was also denied on August 7, 2019.

On September 4, 2019, the Court of Appeals affirmed the trial court's denial of Mr. D.W.'s motion to vacate the dependency on the

ground that it is moot pursuant to *In re Dependency of K.N.J.*, 171 Wn.2d 568, 257 P.3d 522 (2011).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

Review should be granted because this petition raises issues of substantial public interest and significant questions of law under the state and federal Constitutions involving due process and the fundamental rights of a parent throughout the dependency proceedings. RAP 13.4(b)(3), (4); RAP 13.5A(3). Additionally, review should be granted because the Court of Appeals decision conflicts with this Court's ruling in *K.N.J.* RAP 13.4(b)(1).

1. The Court of Appeals Denied Mr. D.W. Due Process by Delaying and Denying Timely Review of His Appeal and Denying Him a Meaningful Opportunity to Be Heard. (RAP 13.4(b)(3),(4))

This matter involves significant questions of law under the state and U.S. Constitutions. Article I, Section 3 of the Constitution of the State of Washington and the Fifth and Fourteenth Amendments to the United States Constitution entitle Mr. D.W. to due process. A parent has a fundamental constitutional right to the care, custody, and control of his children. *In re the Matter of K.J.B.*, 187 Wn.2d 592, 597, 387 P.3d 1072 (2017). That right cannot be abridged without due process of law. *In re the Welfare of Key*, 119 Wn.2d 600, 609, 836 P.2d 200 (1992). "When the

state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Santosky v. Kramer*, 455 U.S. 745, 754, 71 L. Ed. 599, 102 S. Ct. 1388 (1982).

> The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."

Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976). Justice delayed is justice denied. *Arnett v. Kennedy*, 416 U.S. 134, 221, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974).

Here, Mr. D.W. sought appellate review of the trial court's denial of his motion to vacate the dependency orders on June 29, 2017 – *before* trial on the Department's petition to terminate Mr. D.W.'s parental rights and *before* the trial court entered orders terminating Mr. D.W.'s parental rights. It was not until November 17, 2017 – five months after Mr. D.W. filed his notice of appeal – that the Court of Appeals issued a letter opening this matter. *Appendix E.* By then, the appeal on the termination proceedings was already being fast-tracked, allowing the Court of Appeals to determine the termination appeal first and ultimately decline to decide this appeal on its merits as a result. Moreover, the Court of Appeals

unfairly denied Mr. D.W. a meaningful opportunity to be heard when it denied his motions to supplement the appellate record with documentation of his disabilities. The fundamentally unfair procedures employed in the Court of Appeals in this matter deprived Mr. D.W of his constitutional due process right to be heard in a meaningful time and manner, raising a significant question of law under the state and federal constitutions and necessitating review by this Court.

2. The Court of Appeals Decision on This Dependency Case Conflicts With *K.N.J.*, a Termination Case, and Erroneously Bases Its Decision on Review of an Order Not Under Review in this Matter. (RAP 13.4(b)(1), (3), (4))

The Court of Appeal declined to address the merits of Mr. D.W.'s dependency appeal as moot based on this Court's opinion in *K.N.J.*, 171 Wn.2d 568, and termination orders entered in Mr. D.W.'s separate termination of parental rights proceedings. The Court of Appeals' decision conflicts with *K.N.J.*, raises a significant question of law under state and federal constitutions, and involves an issue of substantial public interest. RAP 13.4(b)(1), (3), and (4).

K.N.J. stands for the proposition that, in the event of a void dependency order, a court reviewing a termination order may look to affirm the termination order based on the termination order's other findings of dependency. 171 Wn.2d at 585. It does not stand for the

proposition that a court reviewing a dependency order (not a termination order) can review a termination order (which was not part of the dependency record) to decide whether review of the appealed order entered in the dependency proceedings is moot.

"[A] termination case . . . is distinct from a dependency proceeding." *Matter of Dependency of J.E.R.C.*, 1 Wn.App.2d 765, 769, 406 P.3d 1187 (2017). Indeed, Mr. D.W.'s termination and dependency cases have entirely separate records and appeals that were never consolidated. *See* COA No. 51060-0-II (dependency), COA No. 50710-2-II (termination).

K.N.J. cannot be relied upon here to support the conclusion that Mr. D.W.'s appeal is moot because this is not an appeal from a termination order and the termination order is not under review. This matter is an appeal from an order denying a motion to vacate dependency orders, which was entered in the dependency proceedings.

By reviewing Mr. D.W.'s termination order, which was not under review, instead of the appealed order that was before the Court of Appeals, the Court denied Mr. D.W. due process by reviewing an order that was not before it and by declining to review the merits of the dependency proceedings order that was properly before it. The Court offered Mr. D.W. no opportunity to be heard on its improper review of the termination

order, having denied his request for oral argument and having failed to invite supplemental briefing after the Court, *sua sponte*, supplemented the record with the termination order. *Mathews*, 424 U.S. at 333. This Court should review the case conflict and these constitutional due process and substantial public interest concerns. RAP 13.4(b)(1), (3), and (4).

3. The Court of Appeals *Order Directing Supplement of Record* Deprives Mr. D.W. of His Constitutional and Statutory Due Process Rights and Conflicts with the Court of Appeals' January 22, 2019, Ruling, RAP 8.3, 9.10, 12.1(b), and 1.2(c). (RAP 13.5(b)(1), (2), (3); RAP 13.4(b)(3), (4)).

The Court of Appeals' *Order Directing Supplement of Record* erroneously fails to state a basis for its motion and determination that the record should be supplemented with the final orders entered in separate termination proceedings. "[A]n action to permanently terminate parental rights is a new proceeding and not an extension of the dependency action." *In re Hiebert*, 28 Wn. App. 905, 908-09, 627 P.2d (1981). Therefore, the termination orders entered in the separate termination proceedings are not part of the record in this dependency matter. They should not have been made part of the record in this matter by a *sua sponte* ruling of the Court of Appeals, and Mr. D.W. should have been afforded an opportunity to be heard at a meaningful time and in a meaningful manner on the issue.

Mathews, 424 U.S. at 333. He was not provided an opportunity to be heard, and, so, he was deprived of due process.

Inconsistent with its January 22, 2019, ruling, which prohibited any further motions to supplement the record absent extraordinary circumstances, the Court of Appeals' interlocutory *Order* fails to state what "extraordinary circumstances" justify the Court's *sua sponte* motion and order to supplement the dependency record.

RAP 8.3 authorizes the appellate court to issue orders "to insure effective and equitable review", but the interlocutory *Order* does not indicate that the final orders entered in the termination proceedings are needed for effective and equitable review.

RAP 9.10 authorizes the appellate court to direct the transmittal of additional clerk's papers "[i]f the record is not sufficiently complete to permit a decision on the merits of the issues presented for review[.]" However, the Court of Appeals' order to supplement the record does not indicate that the record is incomplete, and it did not seek the termination orders to decide the merits of the underlying appeal. It obtained the termination orders to support its mootness analysis and avoid a decision on the merits.

"If the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, the court may

notify the parties and give them an opportunity to present written argument on the issue raised by the court." RAP 12.1(b). Mr. D.W. 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.

Although the appellate court may waive or alter the provisions of any of the rules of appellate procedure, such waiver or alteration must serve the ends of justice. RAP 1.2(c). The Court of Appeals' order supplementing the record with the termination order fails to serve the ends of justice and is instead unjustified in its process, and its effect of supplementing the record with final orders entered in a separate and distinct proceeding, and then affirming the challenged order without a decision on the merits of the issues raised.

The Court of Appeals' order supplementing the record denied Mr. D.W. his constitutional due process rights. *In re Welfare of S.I.*, 184 Wn. App. 531, 541, 337 P.3d 1114 (2014). "Due process protections afford parents notice and an opportunity for a hearing appropriate to the nature of the case." *Id.* Mr. D.W. was afforded no notice or opportunity to be heard as to the grounds upon which the Court of Appeals' *Unpublished Opinion* is based. Even if his parental rights have been terminated, appellate review of those termination proceedings is pending, and final orders in a

termination proceeding do not preclude review on the merits of the order denying Mr. D.W.'s motion to vacate the dependency orders entered in dependency proceedings. *In re Dependency of K.N.J.*, 171 Wn.2d 568.

The process used here - a *sua sponte*, conclusory motion and order by the Court of Appeals - deprived Mr. D.W. of due process and a decision on the merits of the issues actually presented in this dependency appeal. No opportunity to be heard has been permitted, increasing the risk of error. Such a process violates Mr. D.W.'s right "to introduce evidence, to be heard in his . . . own behalf, . . . to receive a decision based solely on the evidence adduced at the hearing, and to an unbiased fact finder." RCW 13.34.090(1). "Washington courts favor resolving cases on their merits." *S.I.*, 184 Wn. App. at 544.

F. CONCLUSION

Based on the foregoing, Mr. D.W. respectfully asks this Court to grant discretionary review.

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Respectfully submitted on October 4, 2019.

STAMPER RUBENS, P.S.

By: _____

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APPENDIX

Appendix A	Ruling Denying D.W.'s Motion to Supplement the Record dated December 11, 2018
Appendix B	Ruling Granting Motion to Supplement in Part and Denying in Part dated January 22, 2019
Appendix C	Order Directing Supplement of Record dated April 3, 2019
Appendix D	Unpublished Opinion dated September 4, 2019
Appendix E	Washington State Court of Appeals Division Two Scheduling Letter dated November 17, 2017

APPENDIX A

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 B

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 C

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 D

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 E

Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS**: 9-12, 1-4

November 17, 2017

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CASE #: 51060-0-II Consol.
In re the Dependency of: J.W., A.W. & D.W.
Lewis County Nos. 14-7-00377-0, 14-7-00378-8, 14-7-00379-6
Case Manager: Kim

THIS WILL BE THE ONLY NOTICE THAT YOU WILL RECEIVE CONCERNING DUE DATES. A DOCUMENT FILED PRIOR TO OR AFTER ITS DUE DATE MAY AFFECT ALL SUBSEQUENT DUE DATES. THE PARTIES ARE RESPONSIBLE FOR DETERMINING ADJUSTED DUE DATES BY REVIEWING THE APPROPRIATE RULES OF APPELLATE PROCEDURE.

Counsel:

We received three Notices of Discretionary Review filed June 29, 2017; a ruling converting these to Notices of Appeal and consolidating them was filed November 9, 2017 (Denial of CR 60 motions). The time periods for compliance with the Rules of Appellate Procedure are as follows:

1. The designation of clerks papers should be filed with the trial court by **December 18, 2017.** A copy of the designation should be served and must be filed with the appellate court. RAP 9.6(a).

2. The statement of arrangements should be filed in this court by **December 18, 2017** and a copy served on all parties and all named court reporters. **The statement should include the name of each court reporter, the hearing dates, and the trial court judge. Revised RAP 9.2(a).** If counsel does not intend to file a verbatim report of proceedings, counsel should so notify this court, in writing, by that date. RAP 9.2(a).

Appeal No. 51060-0

3. The verbatim report of proceedings must be filed with the appellate court clerk within 60 days after the statement of arrangements is filed. Revised RAP 9.5(a). **Note: Court Reporters and Transcriptionists must comply with General Order 2015-1. Found at: http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2015-1&div=II**

4. Appellant's opening brief, accompanied by proof of service, should be filed in this court 45 days after the filing of the report of proceedings in the appellate court. RAP 10.2(a) & (h). Pursuant to RAP 10.2(a), if the record on review does not include a report of proceedings, the brief of appellant should be filed within 45 days after the party seeking review has filed the designation of clerks papers and exhibits at the trial court.

5. Respondent's opening brief, accompanied by proof of service, should be filed in this court 30 days after service of the appellant's brief to all parties. RAP 10.2(b) or (c).

6. A reply brief, if any, is due 30 days after service of respondent's brief. RAP 10.2(d). Failure to timely file the brief will result in the brief being placed in the case file without action. The court will give it whatever consideration it wishes.

Counsel's failure to timely comply with the rules of Appellate Procedure may result in the imposition of sanctions pursuant to RAP 18.9. Any request for an extension of time must be made by way of written motion and affidavit showing good cause accompanied by proof of service. The request for additional time should specify a definite date. The granting of an extension request will change all subsequent due dates. Given the usually accelerated nature of cases involving the general welfare and protection of children, please be advised that extensions of time will rarely be granted in such cases.

Counsel must comply with GR 31(e) and omit personal identifiers from all documents filed in this court. This rule provides that "parties shall not include, and if present shall redact" social security numbers, financial account numbers, and driver's license numbers. The rule specifies that the parties have this responsibility and the court will not review filed documents for compliance with this rule. Because unsealed briefs and other documents are made available to the public on the court's website and at our office, counsel must ensure that personal identifiers are removed or redacted.

Very truly yours,

Derek M. Byrne,
Court Clerk

DMB:CB

cc: Lewis County Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

	)	SUP. CT. No. _____
IN RE THE WELFARE OF:	)	COA NO. 51060-0-II (Cons.)
	)	
J.W., A.W., D.W.	)	PROOF OF SERVICE
	)	

I, HAILEY L. LANDRUS of STAMPER RUBENS, P.S., assigned counsel for the Appellant herein, do hereby certify as follows: On October 4, 2019, I served a copy of the attached document on the Court of Appeals, Division II, and on the Department of Children Youth, and Families at John.Macejunas@atg.wa.gov, shojuvef@atg.wa.gov, and shsappealnotification@atg.wa.gov via Washington State Appellate Courts' Secure Portal Electronic Filing system.

Dated and served this 4th of October, 2019.

STAMPER RUBENS, P.S.

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STAMPER RUBENS, P.S.

October 04, 2019 - 1:15 PM

Filing Motion for Discretionary Review of Court of Appeals

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Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	In re the Dependency of: J.W., A.W. & D.W. (510600)

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