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SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF

D.R. and A.R.,

Minor Children.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

D.R., age 14, and her brother A.R., age 13,¹ asked the Court of Appeals to reverse a trial court order terminating their mother's parental rights, to remand the case for a new trial, and to require the trial court to appoint counsel to represent them. The appeal presented alternate theories: (1) the trial court abused its discretion in refusing to appoint counsel under the dependency statute, RCW 13.34.100(6), or (2) the trial court violated the children's claimed constitutional right to counsel.

The Court of Appeals granted their request, accepting the parties' stipulation that the trial court abused its discretion when it refused to appoint counsel for the children, and that this was reversible error. The termination order was reversed and the case remanded for further proceedings, with directions to appoint counsel for the children. The Court of Appeals, however, denied the children's request to "retain jurisdiction" for the sole purpose of determining whether reversal also would have been appropriate on constitutional grounds.

The children now ask this Court to review the Court of Appeals conclusion that the reversal of the termination order was final, and that the appellate court no longer had jurisdiction to render a decision on the constitutional issue. They ask the Court to apply the standard applicable to

¹ D.R.'s birthday is March 22, 1996; A.R.'s is April 30, 1997.

deciding moot cases. However, that standard does not apply here, where the full relief requested by the children has been granted – although not under the theory they preferred.

The Court of Appeals decision is supported by established law and presents no issue that warrants this Court's review. Accordingly, review should be denied.

II. IDENTITY OF ANSWERING PARTY

The Department of Social and Health Services is the Respondent and is the legal guardian and custodian of D.R. and A.R. The Department asks the Court to deny review of the decision designated in Part III.

III. COURT OF APPEALS DECISION

This is an appeal from an order terminating parental rights. The appeal is governed by RAP 18.13A and was decided by a Commissioner's Ruling granting the Department's Motion for Reversal and Remand with directions to the trial court to appoint counsel for the children involved. The Court of Appeals refused to retain jurisdiction to determine whether children, generally, might also have a constitutional right to counsel. The children moved to modify this portion of the Commissioner's Ruling and that motion was denied by the Court of Appeals. Copies of the Ruling and Order are attached to Petitioners' Motion for Discretionary Review.

IV. ISSUES PRESENTED FOR REVIEW

1. Does an appellate court have authority to retain jurisdiction of a case after fully granting the requested relief sought by petitioners, and reversing and remanding to the trial court?
2. Does an appellant who prevails on non-constitutional grounds have a right to continuing appellate court jurisdiction solely to have the issue considered under alternative constitutional theories?

V. STATEMENT OF THE CASE

The Department accepts the Petitioners' procedural history of the case. Motion at 2-6. The underlying facts of the case are set forth in the Department's Brief at 3-16.

VI. ARGUMENT WHY REVIEW SHOULD BE DENIED

The children argue that this Court should accept review under RAP 13.4(b)(3) and (4), claiming the petition involves an issue of substantial public interest and a significant question of state or federal constitutional law. It does not.

The essential issue here is whether an appellate court has jurisdiction to continue to make decisions in a case that has been reversed and remanded to the trial court. This issue is governed by well established law, which was properly applied in this case. It is not an issue of substantial public interest.

These children additionally argue that the Court of Appeals should have treated the case as "technically" moot and proceeded to decide the

question, whether all children always have a constitutional right to counsel in dependency cases, under the standards for deciding moot cases. Again, the law is clear – both as to what constitutes a moot case and when the Court of Appeals loses jurisdiction. This is not a moot case, it is a decided case, and the alternative issue is not one that should be entertained as an advisory opinion. Further, whether a Court should issue an advisory opinion in such a scenario is not a matter of substantial public interest.

The children also claim the question of whether children have a constitutional right to counsel compels this Court's review. In this appeal, like many, the parties argued alternative legal theories to support their positions. A reviewing court is not required to exhaustively address all arguments and theories. This is particularly so where the appellate court is able to decide the case without invalidating a statute on constitutional grounds.² The children here prevailed in the Court of Appeals. They have no right to continue their appeal so that it is decided on their preferred legal theory.

A. Reversal And Remand For A New Trial – With Counsel For The Children - Terminated The Authority Of The Court Of Appeals

² D.R. claims the dependency statute, which provides for appointment of counsel for children, is constitutionally inadequate. Appellant Child D.R.'s Opening Brief at 12.

The children argue that the Court of Appeals had authority to retain jurisdiction over this case after the order granting reversal and remand was entered. This is incorrect.

Pursuant to controlling case law and RAP 12.3 through 12.6, Washington appellate courts lose jurisdiction to take any action on a case upon entry of an order terminating review, which includes orders of reversal and remand. *Reeploeg v. Jensen*, 81 Wn.2d 541, 546, 503 P.2d 99 (1972) (an appellate court loses jurisdiction over a matter upon remand to the trial court); *Hong v. Dep't of Soc. & Health Svcs.*, 146 Wn App 698, 709, 192 P.3d 21 (2008) (an appellate court loses jurisdiction when it has made a final order and control of the case has passed out of its hands).

An order terminating review is “an opinion, order, or judgment of the appellate court or a ruling of a commissioner or clerk of an appellate court” that:

- (1) Is filed after review is accepted by the appellate court filing the decision;
- (2) Terminates review unconditionally; and
- (3) Is a decision on the merits, or a decision of a judge, commissioner, or clerk dismissing review.

RAP 12.3(a)(1)-(3).

In this case, the order came after review was accepted, was a decision on the merits, and terminated review unconditionally. An order of the Court of Appeals that reverses a trial court order and remands the case

back to the trial court is an order terminating review. *See State v. McDermond*, 112 Wn. App. 239, 251, 47 P.3d 600 (2002). Once the decision terminating review is made, the appellate court loses jurisdiction over the matter on appeal. *Reeploeg*, 81 Wn.2d at 546.

All parties to this appeal agreed that the Court of Appeals should immediately reverse and remand the matter to the trial court on the basis that the trial court abused its discretion in failing to appoint counsel to represent D.R. and A.R. They also agreed this failure of the trial court constituted reversible error. When the Court of Appeals entered its order reversing the termination of parental rights and remanding the matter to the trial court, appellate review ended. RAP 12.3(a). No issue in controversy in this case remained. The precise relief requested was granted. *See, e.g.*, Br. of D.R. at 49 (requesting the court “hold that failure to appoint counsel to D.R. and A.R. requires reversal, vacate the order terminating the rights of [the mother], order the trial court to immediately appoint counsel for both children in the dependency proceeding, and remand for further proceedings”); Br. of A.R. at 50 (“A.R. respectfully requests this Court to reverse the termination orders in this case and to remand with orders to appoint counsel for A.R. and D.R. in the ongoing dependency proceedings below”).

Therefore, contrary to the children's claim, this case is not technically moot. Motion at 4. The case was instead fully resolved. *See In re LaBelle*, 107 Wn.2d 196, 200, 728 P.2d 138 (1986) (a case is moot if the appellate court is not able to provide effective relief); *In re Dependency of A.K.*, 130 Wn. App. 862, 125 P.3d 220 (2005), *rev'd on other grounds*, 162 Wn.2d 632 (2007). Therefore, the law relating to when an appellate court decides a moot case is not applicable here.

Nor is the question of the court's continuing authority over an unresolved issue. Appellate courts have consistently ruled that when a decision is final, and not interlocutory, they no longer have jurisdiction to hear the matter. *See, e.g., Hong*, 146 Wn. App. at 709. A court's jurisdiction over a case should not be unending. "The interest in finality requires that there be a determinable point in time at which litigation ceases. To require courts to consider and reconsider cases at the will of litigants would deprive the courts of that stability which is necessary in the administration of justice." *Hong*, 146 Wn. App. at 710 *citing, Kosten v. Fleming*, 17 Wn.2d 500, 505, 136 P.2d 449 (1943).

As noted in the Commissioner's ruling, the cases the children relied upon in arguing that a reviewing court may hear dispositive issues, even if the case is rendered moot, are distinguishable. The issues in the cases relied upon by the children were rendered moot due to their own

procedural accord, not by a specific decision of the appellate court. *Commissioner's Ruling* at 2. Here the Court of Appeals did give a specific decision. There is simply no basis under the mootness doctrine for this Court to consider a case that has been fully resolved. The children argue this is a "distinction without a difference". Motion at 10. This is clearly incorrect. In a moot case the appellate court has no opportunity to review and decide an issue. In a case that is fully resolved on the merits, such as this one, the appellate court made a decision and granted the relief requested - just not on the legal basis preferred by the children.

The Court of Appeals applied well settled law and correctly decided not to continue review of an appeal that was remanded to the trial court. This does not raise an issue of substantial public interest and review should be denied on this issue

B. Washington Appellate Courts Do Not Consider Constitutional Questions When the Issue Can Be Resolved On Non-Constitutional Grounds

Putting aside the fact that the case is final and remanded and therefore inappropriate for further review, the children argue that the Court should accept review to decide whether children in dependency actions in Washington have a constitutional right to counsel at public expense. As the children note, this is an issue which is of interest to many local and national

advocacy organizations. Motion at 15.³ However, it is not an issue that should be decided by this Court in this case.

It is a well established principle that Washington Courts will not decide an issue on constitutional grounds when that issue can be resolved on other grounds. *Tommy P. v. Board of County Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982); *Washington State Farm Bureau Fed. v. Gregoire*, 162 Wn.2d 284, 291 n.7, 174 P.3d 1142 (2007); *Washington State Coalition for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 932, 949 P.2d 1291 (1997). See also *In re Dependency of Grove*, 127 Wn.2d 221, 229, 234, 897 P.2d 1252 (1995) (refusing to consider parent's constitutional right to counsel in dependency action because the right to counsel issue was resolved on statutory grounds); *In re Welfare of G.E.*, 116 Wn. App. 326, 65 P.3d 1219 (2003) (refusing to consider parent's constitutional right to counsel in a dependency action because the court determined that the trial court's denial of counsel violated the parent's statutory right to counsel provided by RCW 13.34.090(2)).

³ The Department recognizes and supports the work that has been done by the Supreme Court's Commission on Children in Foster Care, the Office of Civil Legal Aid, and by other advocacy groups on issues relating to representation for children in dependency proceedings. As noted in the Declarations of former Supreme Court Justice Bobbe J. Bridge, and Children's Representation Project Attorney Jill Malat, filed in the Court of Appeals, these advocacy groups are appropriately pursuing legislation, as well as education of social workers, judicial officers, parents' attorneys, and guardians ad litem on the benefits and process of requesting representation under the current statute, RCW 13.34.100(6), for children in dependency proceedings.

This Court should decline discretionary review to resolve an issue that has been fully resolved on other than constitutional grounds.

Here, the Department conceded, and the children agreed, that the trial court abused its discretion by refusing to appoint counsel for D.R. and A.R. pursuant to RCW 13.34.100(6). *See* Department's Motion to Reverse and Remand, at 2. Children's Response to State's Motion to Reverse and Remand at 1. The parties also agreed the trial court's action was not harmless error in that it may have affected the outcome of the trial. Motion to Reverse and Remand at 3. Children's Response to State's Motion to Reverse and Remand at 1. The Department, the mother, and children agreed the order terminating parental rights must be reversed and remanded to the trial court.

The issue of whether the children in this case should have been appointed counsel was resolved on non-constitutional grounds. Under well established law, this Court would not reach the constitutional issue.

The Court should leave the constitutional issue raised by the children for another day – when it is properly before the Court.

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VII. CONCLUSION

For the foregoing reasons, the Department respectfully requests the Court deny the Motion for Discretionary Review.

DATED the 12 day of March, 2010.

Respectfully submitted



LISA LYDON, WSBA #19238
Assistant Attorney General

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In re the Dependency of:

D.R. and A.R.

DECLARATION OF
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I, Danielle Hunter, state that on March 12, 2010, I deposited in the United States mails by first class mail, proper postage affixed, the following documents: Answer to Motion for Discretionary Review regarding the above-referenced matter to:

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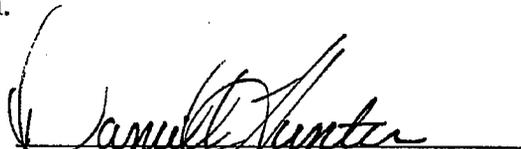
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 12th day of March, 2010 at Spokane, Washington.


DANIELLE HUNTER
Office of the Attorney General

OFFICE RECEPTIONIST, CLERK

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Subject: Dependency of D.R. and A.R.

Attached hereto for filing with your court is our Answer to Motion for Discretionary Review.

Case Name : D.R. and A.R., Minor Children

Case Number: 80513-0

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If there are any problems, please contact me immediately. Thank you.

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