NO. 1039221

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of X.T.J. and X.M.J.,

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Law enforcement placed two-year-old X.T.J. and his little sister X.M.J., both members of the Cowlitz Indian Tribe, in protective custody after X.T.J.'s hospitalization for exposure to methamphetamine and cocaine. Both children were returned to mother D.B.-K. three days later. After attempting to stabilize the family, the Department of Children, Youth, and Families (DCYF) filed dependency petitions, and the court authorized another brief removal before returning the children to D.B.-K.'s care. Sadly, several weeks later, X.T.J. died. The court again removed toddler X.M.J. on an emergency basis but returned her days later when it was confirmed that her brother's death was not due to neglect but due to an underlying medical issue. The court later dismissed both dependency cases.

This Court should deny review. First, as DCYF argues in its separate motion to strike, D.B.-K. raises several issues related to the Indian Child Welfare Act (ICWA) and the Washington

State Indian Child Welfare Act (WICWA) that are untimely and therefore inappropriate for this Court's review.

Second, the issues before this Court are moot. The juvenile court placed X.M.J. with her mother and dismissed the dependency cases. No state intervention or intrusion is authorized. This Court therefore cannot provide effective relief, and the asserted errors here do not raise issues of substantial and continuing public interest.

Third, there is no basis for review of the ICWA/WICWA issues under RAP 13.5(b). The Court of Appeals properly denied review as moot, and D.B.-K. fails to demonstrate an issue of continuing and substantial public interest. This Court has given guidance on the issues raised, including the appropriate standard for an emergency removal of an Indian[1] child and the remedy for

[1] This answer uses the terms "Indian child" and "Indian family" when referring to statutory language that also uses this language. No disrespect is intended.

a failure to demonstrate active efforts. No additional guidance is needed.

Finally, this Court should deny review of D.B.-K.'s challenge to the order authorizing health and safety visits under RAP 13.4(b). The juvenile court soundly exercised its discretion to order a very limited eyes-on check of the child to ensure her health and safety. This unique factual scenario and the subsequent amendments to the statutory scheme under which the order entered make this case a poor vehicle for rendering an advisory opinion on this moot claim. This Court should deny review.

II. RESTATEMENT OF THE ISSUES

1. Should this Court dismiss this moot appeal, where DCYF voluntarily dismissed its dependency action four days after the final challenged order went into effect and this case does not present any issue of substantial public interest?

2. Did the orders below comply with ICWA, WICWA, and this Court's clear guidance on the standard for emergency

removal of Native children and the remedy for failure to comply with that standard?

3. Did the juvenile court act within its sound discretion when it authorized limited checks on X.M.J. in D.B.-K.'s home or at daycare while the dependency case was pending, to occur only with a tribal or Office of Public Defense social worker present?

III. STATEMENT OF FACTS

This case involves the mother D.B.-K. and her children. CP 2. At the time of this case, X.T.J. was two years old and X.M.J. was one year old. 2, CP 121. All three were members of the Cowlitz Indian Tribe (Cowlitz Tribe). CP 2. The father is deceased. CP 1. Sadly, X.T.J. is also now deceased. CP 122.

A. DCYF Intervenes When X.T.J. Is Hospitalized Due to Substance Exposure

On January 23, 2023, D.B.-K. and the maternal grandmother brought two-year-old X.T.J. to the emergency room because the child had ingested methamphetamines and cocaine. CP 2-3. X.T.J. had been exposed at a relative's home while his

paternal grandmother cared for him. CP 2-3, 121. DCYF learned that D.B.-K. knew the paternal grandmother used substances but permitted her to care for X.T.J. anyway. CP 2-3, 121. Although she observed signs of unusual behavior and knew the child might have ingested drugs, D.B.-K. waited several hours before bringing him to the hospital. CP 2-3, 121.

Law enforcement placed both children into protective custody. CP 4. DCYF assumed custody and placed both children with their maternal aunt. CP 4-5; RP[2] 206. Because the aunt did not have a safe home for the children, DCYF and the Cowlitz Tribe funded a hotel. RP 118-20. DCYF permitted D.B.-K. to stay at the hotel during the day but not overnight. RP 231-32.

Two days later, DCYF met with D.B.-K., the Cowlitz Tribe, and maternal relatives. CP 4-5. The participants discussed

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[2] DCYF cites to the verbatim report of proceedings in the following manner:

"RP" refers to the consecutively-paginated volume that includes hearings February 7, 2023 through March 1, 2023.

DCYF refers to the supplemental volume by date: 3/30/23 RP and 4/4/23 RP.

alternatives to court involvement, including implementing a safety plan to ensure the children's safety while in the care of their mother or executing a Voluntary Placement Agreement, an agreement where the parent voluntarily consents to out-of-home placement. CP 4-5; *see* RCW 13.34.245. D.B.-K. indicated agreement with a Voluntary Placement Agreement but then later changed her mind. CP 4-5. DCYF released the children to D.B.-K.'s care. CP 32.

DCYF worked with the Cowlitz tribal caseworker to assist the family. CP 42-43. D.B.-K. identified childcare as a need. CP 6, 30. DCYF funded childcare and researched childcare centers with openings. CP 42, 50, 122. D.B.-K. did not access childcare. CP 122. D.B.-K. also required transportation assistance, so DCYF provided a public transit bus pass. CP 42-43, 49, 79. DCYF also provided clothing vouchers. CP 42-43, 49.

DCYF also referred D.B.-K. for Family Preservation Services. CP 42; RP 88, 94. The Cowlitz Tribe offered tribal mental health counseling. CP 43; RP 95. DCYF offered random

urinalysis tests. CP 51, 66. On advice of counsel, D.B.-K. declined all services except daycare funding (although she never accessed childcare), clothing vouchers, and the bus pass. CP 44; RP 187.

D.B.-K. did not bring X.T.J. in for his scheduled follow-up medical appointment, although she did take him three days later. CP 6. DCYF also learned that X.T.J. and X.M.J. had not been seen for well-child checks in over a year. CP 6. The children were not up to date on vaccinations. CP 6.

Finally, D.B.-K. tested positive for cocaine use, one of the substances to which X.T.J. had been exposed. CP 7; RP 6.

B. Dependency Petition, Brief Emergency Removal, and Return

DCYF filed dependency petitions as to both children on February 3, 2023. CP 1-8. The court issued an order to take the children into custody ("pick-up order"). CP 9-13.

A shelter care hearing commenced on February 7, 2023. CP 89. The Cowlitz Tribe was present and participated. CP 89. Two days into the hearing, based on the information it learned

through testimony, the court assessed the imminent physical harm to the children had abated since the pick-up order. CP 90. The court returned the children to D.B.-K. immediately on certain conditions. CP 90, 121. The court required that: (1) D.B.-K. permit no contact between the children and their paternal grandmother, (2) D.B.-K. not reside at the home at which X.T.J. was exposed to drugs, and (3) there be no illegal drug use in the home. RP 236-37.

The court entered a shelter care order on February 24, 2023. CP 88-98. The order reflected the children's prior release to D.B.-K. and the court's conditions. CP 93.

DCYF continued to work with D.B.-K. to address her deficiencies. CP 122. D.B.-K. declined all offers of services. CP 122. DCYF attempted to monitor the family but had limited access to the children. CP 122. DCYF completed one health and safety visit at the hotel room where D.B.-K., the maternal aunt, and the children lived together. CP 121-22.

C. Death of X.T.J. and Emergency Removal of X.M.J.

On March 23, 2023, D.B.-K. picked up lunch for the children on their way back to the hotel. CP 122. X.T.J. looked sleepy when they arrived home so D.B.-K. laid him down for a nap. CP 122. About ten minutes later, his lips were blue and he was not breathing. CP 122. She called 911 and Emergency Medical Technicians (EMTs) responded. CP 122. DCYF received a report that "the EMT crew noted that there were large chunks of food that had to be remove[d] from [X.T.J.'s] esophagus." CP 122. X.T.J. was transported from Yakima Memorial to Seattle Children's Hospital. CP 122. Although the cause was not immediately clear, physicians ultimately determined that the medical event occurred due to a heart attack caused by a genetic heart condition. 4/4/23 RP 69. On March 27, 2023, D.B.-K. took X.T.J. off life support and the child passed away. CP 122.

On March 29, 2023, before a previously scheduled hearing, DCYF filed an affidavit providing the court with

preliminary information regarding X.T.J.'s death. CP 121-23. DCYF explained that it had not been able to work with D.B.-K. or develop a safety plan because D.B.-K. had declined to engage or allow access to the children. CP 121-22. DCYF requested that the court authorize DCYF to "complete an assessment of safety to [X.M.J.]," including in-home health and safety visits and monthly face-to-face parent contact, as well as a "safety plan with safety plan participants or place the child in out of home care due to imminent physical harm until services and a safety plan can be agreed." CP 122.

At a hearing the next day, the court ordered X.M.J.'s removal. CP 124-26; 3/30/23 RP 26-27. D.B.-K. was not present. 3/30/23 RP 4. The court stated, "We had one near death already with an overdose and now we have a death. And it is of utmost importance that these children are [. . .] taken care of and they cannot protect themselves." 3/30/23RP 26-27. The court set a show cause hearing for the next day. 3/30/23 RP 26. The court again placed X.M.J. with the maternal aunt. CP 126. The court

allowed D.B.-K. to remain in the hotel room except overnight. CP 126.

D. Agreed Return of X.M.J. and Dismissal of Dependency

At the time of the show cause hearing on April 4, 2023, the parties agreed that X.T.J. had died of natural causes and that X.M.J. should be returned to D.B.-K. CP 128; 4/4/23 RP 66-67, 81-82.

DCYF asked that the court place two conditions on X.M.J.'s return to D.B.-K.'s care: that D.B.-K. and X.M.J. continue to reside with the aunt and that D.B.-K. participate in health and safety visits, which could occur at daycare. 4/4/23 RP 84. DCYF indicated that it just wanted to "have eyes on the child." RP 90. D.B.-K. and the Cowlitz Tribe objected on grounds that the request was overly intrusive and the visits would be used to "investigate" the family. 4/4/23 RP 74-75, 80-81, 101-02. They requested that, if ordered, home visits occur only with a tribal representative or Office of Public Defense social worker present. 4/4/23 RP 94, 102.

In an April 10, 2023 order, the court returned the child home. CP 128-29. The court ordered one health and safety visit to occur every 30 days. CP 129; 4/4/23 RP 93. In its oral ruling, the court directed that the visit would "just be an eyes on the child situation" and would only be to "confirm that the child is healthy." 4/4/23 RP 93-94. The visit "would not involve any extended interview." 4/4/23 RP 93-94. Ultimately, the court's order contained the following restrictions:

> Safety visits: The Department may not conduct more than one health and safety check on the child every 30 days. The Department may only talk to and interact with the child during the health and safety check. Health and safety checks may be done in the home or at day care. Health and safety checks in the home may only take place with the Cowlitz Indian Tribe's social worker or the [Office of Public Defense] social worker present. The Department must pre-arrange the physical presence of either social worker.

CP 129.

Four days later, DCYF voluntarily dismissed the dependency petition regarding X.M.J. CP 130-32.

E. Mother and Cowlitz Tribe Appeal

D.B.-K. and the Cowlitz Tribe sought discretionary review of several orders on various grounds. CP 101-18, 133-46. A Court of Appeals Commissioner denied discretionary review. Commissioner Ruling Denying Review filed 10/31/23 (Commissioner Ruling).[3] D.B.-K. and Cowlitz Tribe filed motions to modify. On February 7, 2024, the Court of Appeals granted review of the April 10 order only. Order Granting Motion to Modify Commissioners Ruling (April 10, 2023 Order) filed 2/7/23.[4] D.B.-K. did not seek this Court's review of the Court of Appeals' decision denying discretionary review of the other issues.

The Court of Appeals issued an unpublished opinion on January 30, 2025, dismissing review as moot. *In re Dependency of X.T.J. and X.M.J.*, No. 39591-0-III, 2025 WL 338596 (Wash.

[3] A copy of this ruling is in the Petition for Review Appendix at pages 1-18.

[4] A copy of this order is in the Petition for Review Appendix at page 19.

Ct. App. Jan. 30, 2025) (unpublished – see GR 14.1).[5] D.B.-K. filed a Petition for Review seeking this Court's review of not only the April 10 order, but also the other issues of which the Court of Appeals denied review. *See* Petition.

IV. ARGUMENT

This Court should deny D.B.-K.'s Petition for Review. D.B.-K.'s untimely ICWA and WICWA challenges are moot and do not present any issue of substantial public interest. Even if this Court were to permit consideration of these untimely, moot issues, D.B.-K. fails to meet any criteria for review under RAP 13.5(b).

The sole timely issue raised, regarding health and safety visits, is also moot as the court dismissed the dependency matter. The Court of Appeals correctly determined that this case does not present a good vehicle for an advisory opinion on the legal question because of the atypical fact pattern, the intervening

[5] This slip opinion is in the Petition for Review Appendix at page 20-25.

legislative amendments to the shelter care statute, and the fact that another opportunity will likely arise to consider this question under current law. This Court should decline review.

A. This Court Should Dismiss the Untimely Petition as Moot

As argued in DCYF's motion to strike, D.B.-K.'s ICWA and WICWA challenges are untimely and should be stricken. The Court of Appeals also correctly concluded that the issues raised by D.B.-K. are moot and do not present issues of continuing and substantial public interest warranting review. This Court should decline review.

A case is moot when the appellate court can no longer provide effective relief. *In re Dependency of L.C.S.*, 200 Wn.2d 91, 98, 514 P.3d 644 (2022). Generally, appellate courts will not review a moot case. *Id.* at 99. But courts may review a moot case if the contested issue is a matter of continuing and substantial public interest. *Id.* In deciding whether a case presents an issue of continuing and substantial public interest, this Court considers the following factors: whether the issue is of public or private

nature, whether an authoritative determination is desirable to provide future guidance, and whether the issue is likely to reoccur. *Id.* The court may also consider the adverseness of the parties, the quality of the advocacy, and the likelihood that the issue will escape review. *Id.*

It is undisputed that all issues raised in D.B.-K.'s Petition for Review are moot because the court dismissed the dependency petition. D.B.-K.'s contentions regarding ICWA and WICWA also do not present issues of continuing and substantial public interest. The Court of Appeals appropriately rejected review of these issues over a year ago for this very reason. Petition for Review Appendix at 19. This Court has already provided ample guidance and addressed the appropriate standard of removal under ICWA and WICWA, whether the Department must meet certain ICWA and WICWA requirements where it is impossible to do so, and the appropriate remedy when an Indian child is improperly removed at shelter care. *See In re Dependency of*

J.M.W., 199 Wn.2d 837, 514 P.3d 186 (2022). Thus, this case would not provide future guidance to public officers.

As will be further detailed below, D.B.-K.'s challenge to the court's authority to order health and safety visits also fails to meet the exception to mootness. After accepting review, the Court of Appeals concluded that this case presented an atypical fact pattern and is not an appropriate vehicle to provide guidance because, due to an intervening statutory change, an opinion on the merits would necessarily address laws or regulations that are no longer in effect. Slip Op. at 5. The Court of Appeals is correct, and any opinion under the prior statutory scheme would provide little guidance to future courts.

This Court should deny review.

B. This Court Need Not Accept Review to Reaffirm that Removal Orders Must Comply with ICWA and WICWA

Should this Court evaluate D.B.-K.'s untimely, moot challenges, this Court should deny review under RAP 13.5(b). To obtain review under that rule, D.B.-K. must demonstrate that

the Court of Appeals committed obvious or probable error in declining review due to mootness and must establish that the error renders further proceedings useless or substantially alters the status quo or substantially limits the freedom of a party to act. Her request does not meet the criteria for review under RAP 13.5(b)(1) or (2).[6]

1. This Court already resolved the correct standards for emergency removals in *J.M.W.*

This Court has already resolved the legal standards for the emergency removal of a Native child. Where ICWA and WICWA apply, the emergency removal standard requires the juvenile court to make a specific factual finding—that removal was necessary to prevent imminent physical damage or harm. *See* RCW 13.38.030(1)(a)(i); RCW 13.38.140; *J.M.W.*, 199 Wn.2d at 840; *In re Dependency of A.W.*, 24 Wn. App. 2d 76, 93, 519 P.3d 262 (2022). Additionally, where (like here) DCYF had prior

[6] D.B.-K. argues that this Court should accept review under RAP 13.4; however, that rule is inapplicable where the Court of Appeals denied review of an interlocutory order. Petition at 48; *see* RAP 13.3(a)(2).

contact with the family and reason to believe the child was at risk of physical damage or harm, WICWA requires that DCYF prove it made active efforts to prevent the breakup of the family. RCW 13.38.030(1)(a)(i); RCW 13.38.140; *J.M.W.*, 199 Wn.2d at 848; *A.W.*, 24 Wn. App. 2d at 94.

D.B.-K. argues the court should have applied the involuntary foster care placement standard in RCW 13.38.130(2) to the February 3 and March 30 pick-up orders, rather than relying on the emergency removal standards under 25 U.S.C. § 1922, 25 C.F.R. § 23.113(b)(1), and RCW 13.38.140(1). Petition at 21, 25. This would require testimony of a qualified expert witness (QEW) that the "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." RCW 13.38.130(2); Petition at 21, 25-26.

This issue is resolved by *J.M.W.* 199 Wn.2d at 848 n.4; *see also A.W.*, 24 Wn. App. 2d at 93. First, this Court recognized that DCYF may be called upon to place children in its custody under

emergency circumstances, such as a pickup order, where prior active efforts are not required. *See J.M.W.*, 199 Wn.2d at 847-58. Second, although an initial shelter care order is a foster care placement, this Court acknowledged in *J.M.W.* that WICWA does not impose certain procedural requirements at an initial shelter care hearing where it is impossible to comply with such requirements. *See J.M.W.*, 199 Wn.2d at 848 n.4. Evidence supporting a juvenile court's finding that the parents' continued custody is likely to result in serious emotional or physical damage to the child must include QEW testimony. 25 U.S.C. § 1912(e); RCW 13.38.130(2). But WICWA requires that the Department provide at least 20 days' notice to the child's Tribe of the need to provide QEW testimony at the hearing. RCW 13.38.130(4)(a). It was impossible to provide the Tribe 20 days' notice of the need to provide a QEW, and therefore impossible to secure QEW testimony prior to the February 3 pick-up order.

Further, it would be nonsensical to require QEW testimony when not enough time has elapsed to give a child's Tribe its statutorily-required legal notice and therefore allow the Tribe the opportunity to identify a QEW. Requiring otherwise would disrespect Tribes' sovereignty, as well as ICWA and WICWA's statutory preference that a QEW be familiar with the social and cultural standards of the child's Tribe. *See* RCW 13.38.130(4)(b)(i); Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act (Guidelines)*, at 54 (2016), available at: https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf.

Regarding the February 3 pick-up order, DCYF concedes that the trial court failed to apply the correct emergency removal standard required by ICWA and WICWA when it did not find that X.M.J.'s removal was necessary to prevent imminent physical damage or harm. CP 11-13. But the issue is moot and additional guidance on this issue is not required given the

numerous recent decisions regarding these issues. *J.M.W.*, 199 Wn.2d at 844; *A.W.*, 24 Wn. App. 2d at 93.

Like the February 3 pick-up order, the March 30 pick-up order occurred on an emergency basis. The court applied the emergency removal standard in finding that the removal was necessary to prevent imminent physical damage or harm. CP 125. And for the same reasons as the February 3 order, that is the correct standard. Although the dependency petition had been pending for some time when the court decided to remove X.M.J., no party brought a motion for removal and DCYF had no notice that it would need to provide a QEW to support such a removal. ICWA and WICWA have never been interpreted to provide an absolute bar to courts acting to ensure the safety of children; in fact, "nothing shall be construed to prevent the department or law enforcement from the emergency removal of an Indian child [. . .] to prevent imminent physical damage or harm to the child." RCW 13.38.140. This is consistent with this Court's determination in *J.M.W.* as well as the need to protect the "safety,

well-being, development, and stability of the Indian child." *See J.M.W.*, 199 Wn.2d at 848 n.4; RCW 13.38.040(2)(a).

D.B.-K. also contends that the emergency removal statute permits the State to exert jurisdiction only where a tribe would otherwise have exclusive jurisdiction. Petition at 26-27. This is simply wrong following this Court's decision in *J.M.W.*, which applies RCW 13.38.140 to the removal of a child not under the exclusive jurisdiction of a tribe. *J.M.W.*, 199 Wn.2d at 850.

This Court in *J.M.W.* already gave adequate guidance on when a court is obligated to meet the full foster care placement standard under RCW 13.38.130(2). Because it was impossible to comply with the procedural requirements of RCW 13.38.130(2) here, WICWA did not require either QEW testimony or a finding that the parents' continued custody was likely to result in serious emotional or physical damage in either the February 3 or March 30 pick-up order. Additional guidance is not necessary here.

2. This Court has already made clear that a checkbox is not sufficient for an active efforts finding

"Active efforts must be documented in detail in the record." 25 C.F.R. § 23.120(b); *See in re Dependency of G.J.A.*, 197 Wn.2d 868, 902, 489 P.3d 631 (2021) *see also Guidelines* at 44 ("The active-efforts requirement is a key protection provided by ICWA, and it is important that compliance with the requirement is documented in the court record."). It is DCYF's responsibility to clearly document its actions in the record to enable the court to reach an informed conclusion about DCYF's provision of active efforts. *G.J.A.*, 197 Wn. 2d at 893.

The Court of Appeals Commissioner determined that the court probably erred in ordering the March 30 removal because the record did not document DCYF's active efforts in detail. Commissioner Ruling at 17. DCYF acknowledges that it provided limited information to the court regarding the efforts it made, and the court did not make a clear record regarding the efforts made when it removed X.M.J. CP 121-22, 125.

But this Court should not accept review to restate that active efforts must be documented in detail in the record, which is undisputed and well addressed by this Court in *G.J.A.* This Court should also not accept review to evaluate whether there was sufficient evidence for the court to find active efforts on this record. *See* Petition at 22-24. To do so would be a review only of the court's application of existing law to the facts of this case, which would not be helpful to judicial officers beyond this Court's prior opinions on active efforts. *See J.M.W.*, 199 Wn.2d at 849; *G.J.A.*, 197 Wn.2d at 887; *See In re Dependency of A.L.K.*, 196 Wn.2d 697, 478 P.3d 63 (2020). This Court has already affirmed that ICWA requires DCYF to actively engage the parent. Petition at 23; *G.J.A.*, 197 Wn.2d at 888. This Court has also declared that workers must be cognizant of mistrust of government actors. Petition at 23-24; *G.J.A.*, 197 Wn.2d at 905. Finally, this Court has made clear that a parent's actions cannot excuse DCYF's obligations regarding active efforts. Petition at 24; *G.J.A.*, 197 Wn.2d at 906; *A.L.K.*, 196 Wn.2d at 696-97.

D.B.-K. fails to demonstrate a basis for review under RAP 13.5(b). Review should be denied.

3. This Court Should Not Accept Review to Reiterate the Proper Application of the Remedy for an Improper Removal

D.B.-K. here argues, contrary to ICWA, WICWA, and this Court's decisions in *J.M.W.* and *A.L.K.*, that when DCYF fails to make active efforts, the juvenile court must decline jurisdiction over the petition. Petition at 28-30. But she misreads critical language in ICWA and WICWA. Both Acts provide that when a petitioner

> has improperly removed the child from custody of the parent . . . the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent . . . *unless* returning the child to his parent . . . would subject the child to a substantial and immediate danger or threat of such danger.

25 U.S.C. § 1920 (emphasis added); *see* RCW 13.38.160; *Guidelines*, at 74 (providing that when a child has been improperly maintained in out-of-home care, "the court should return the child to his/her parent . . . unless returning the child to his/her parent . . . would subject the child to a substantial and

immediate danger or threat of such danger."). This Court has addressed this remedy. *See J.M.W.*, 199 Wn.2d at 849; *A.L.K.*, 196 Wn.2d at 704 ("Under [RCW 13.38.160], the remedy is to remand to the trial court to immediately return [the children] to their mother if it cannot make the statutorily required finding that returning them would subject them to 'a substantial and immediate danger or threat of such danger.'").

No Washington court, examining the same statutory language, has held that a juvenile court must decline jurisdiction over a dependency when the Department improperly removes a child. Rather, the Acts require that a court first determine whether returning the children to their parents would subject them to substantial and immediate danger or threat of such danger before it may decline jurisdiction over the proceedings. *See* 25 U.S.C. § 1920; *see* RCW 13.38.160.

If this Court were to determine that DCYF did not make active efforts or that DCYF was required, but failed, to show that the parents' continued custody is likely to result in serious

emotional or physical damage to the child, the appropriate remedy would be remand to the juvenile court to immediately return the children to their parents' care unless returning them would subject them to substantial and immediate danger or threat of such danger—not to decline jurisdiction over the dependency petitions. The remedy is well-settled by ICWA, WICWA, and this Court. Here, however, all proceedings have been dismissed and there is no remedy available to D.B.-K.

Nor does D.B.-K. demonstrate that the court incorrectly applied the improper removal remedy in this case. Here, in the March 30 order, the court already found by clear, cogent, and convincing evidence that D.B.-K.'s continued custody would subject X.M.J. to substantial and immediate danger or threat of such danger. CP 125. The Court of Appeals Commissioner correctly determined that because the remedy for any lack of active efforts had effectively been applied, there is no need for discretionary review. Ruling at 17.

D.B.-K. argues that the improper removal standard cannot be relied upon unless there has already been an improper removal. Petition at 25-26. To the contrary, RCW 13.38.160 ensures that no child will be returned to a situation where that child would face danger. D.B.-K.'s interpretation would require that courts return children to dangerous homes. It would take away one of the tools provided to juvenile courts by the Legislature to keep Native children safe. Allowing courts to use the improper removal remedy in this way balances multiple important goals, including but not limited to the safety of the Native child. *See* RCW 13.38.030; RCW 13.38.040(2) (defining "best interests of the Indian child"). Moreover, there is no statutory or caselaw support for D.B.-K.'s contention.

D.B.-K. fails to demonstrate a basis for discretionary review under RAP 13.5(b). She fails to demonstrate that the Court of Appeals erred in denying review of the ICWA and WICWA issues due to mootness. Additionally, any error does not render further proceedings useless or substantially alter the

status quo or limit the freedom of the party to act given that the dependency proceedings below were dismissed nearly two years ago. RAP 13.5(b)(1). Review of this moot case is not warranted here.

C. This Court Should Decline Review of the Health and Safety Issue to Avoid Rendering an Advisory Opinion Under a Prior Statutory Scheme

The only issue timely presented for this Court's review relates to the court's authority to order health and safety visits in its April 10 order. While this issue is timely presented, it does not warrant this Court's review because it is moot and would require an advisory opinion applying the facts of D.B.-K.'s case to a prior statutory scheme. This would provide little guidance to lower courts. This Court should not issue a broad rule regarding the juvenile court's authority to order home visits, where the question is not squarely presented. This Court should also reject D.B.-K.'s invitation to impose a criminal standard in this civil matter based on out-of-state cases involving different facts and legal frameworks. The court below applied its discretion to

permit an extremely limited "eyes on" check on the child in the home. This Court should deny review.

1. This moot issue is not one of continuing and substantial public interest

The Court of Appeals correctly concluded that the issues raised by D.B.-K. are moot and do not present issues of continuing and substantial public interest warranting review. Slip op. at 4-5. This Court should decline review.

The issue here is not a matter of continuing and substantial public interest. *L.C.S.*, 200 Wn.2d at 99. The issue here is of a limited and private nature. The Court of Appeals correctly determined that this case has an atypical fact pattern. Slip op. at 1. This issue is raised in an order entered at a very specific stage in a dependency: after the dependency petition was filed, before the merits hearing on the petition, and while the child lived with D.B.-K. following an emergency removal. This issue is narrow: whether, under the circumstances presented here, the court erred when it entered an order permitting DCYF to visit X.M.J., for whom a dependency petition had been filed, at D.B.-K.'s home

or daycare, to confirm that the child remained safe in her mother's care. D.B.-K. does not challenge the constitutionality of any statute or court rule. Instead, she challenges an order issued under the specific facts of her case. *See Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 451, 759 P.2d 1206 (1988) ("Decisions of moot cases with limited fact situations provide little guidance to other public officials."). If the constitutional concern extends to other families, this issue will present again in future cases.

Next, this case is not a good vehicle for authoritative guidance due to subsequent amendments to the statutes at issue. After the court issued the challenged order here, the standard for a court to place a child in shelter care changed. The Keeping Families Together Act ("HB 1227"), Laws of 2021, ch. 211, significantly amended the shelter care statute, RCW 13.34.065. Effective July 1, 2023, a court must first find, in addition to other requirements, that removal is necessary to prevent imminent physical harm due to child abuse or neglect and that any

imminent physical harm to the child outweighs the harm the child will experience as a result of removal. RCW 13.34.065(5)(a); Laws of 2021, ch. 211, § 9. If those things are true, the court must then assess whether any prevention services would prevent or eliminate the need for removal. RCW 13.34.065(5)(b). If so, and the parent agrees to participate in the proposed prevention services as a condition of the child's placement in the parent's care, then the court must return the child. RCW 13.34.065(5)(b)(i). As correctly determined by the Court of Appeals, this case does not provide an appropriate vehicle to provide guidance because it would provide guidance under a statutory scheme no longer in effect. Slip op. at 5. Any opinion under the prior statutory scheme would provide little guidance to future courts.

DCYF agrees with D.B.-K. that ongoing disproportionality of Native families in the child welfare system is a critical concern. Pet at 38-42, 43-6. Congress enacted ICWA to remedy the historical destruction of Native families and

communities while simultaneously ensuring the safety of Native children. *See In re Dependency of Z.J.G.*, 196 Wn.2d 152, 157, 471 P.3d 853 (2020). A key goal of WICWA is to prevent out-of-home placement of Native children if possible. *See* RCW 13.38.030. In enacting WICWA, the Legislature intended to provide additional protections against racial disproportionality in removal decisions. *See Z.J.G.*, 196 Wn.2d at 156. But in addition to preventing unnecessary out-of-home placement, the Legislature sought to protect the safety, well-being, development, and stability of Native children. RCW 13.38.030; RCW 13.38.040(2) (defining "best interests of the Indian child"). Due to the delicate balance of competing concerns in these cases, clear and careful guidance is critical. Such guidance is not possible here because of the significant statutory changes that went into effect after these orders were entered. An advisory opinion based on an obsolete statutory scheme risks confusion.

D.B.-K. fails to demonstrate that this is the rare moot case warranting this Court's review.

2. This Court should reject D.B.-K.'s invitation to import out-of-state caselaw about a statutory scheme that does not exist in Washington

D.B.-K. fails to demonstrate a basis for review because she fails to show a significant constitutional question or an issue of substantial public interest. RAP 13.4(b)(3), (4). D.B.-K. asserts that the court's order authorizing DCYF to conduct one visit with the child per month violated the Fourth Amendment of the United States Constitution and Article 1, Section 7 of the Washington Constitution based on the rules of a distinguishable Pennsylvania case, *In re Interest of Y.W.-B.*, 265 A.3d 602 (Pa. 2021). Petition at 32. In addition to not being binding, that case set forth a scenario not analogous to the request made by DCYF here. The case is not helpful. This Court should decline to interpret the court's authority to order home visits where the facts of this case do not squarely present this question. This Court should deny review.

First, to the extent that D.B.-K. seeks review in order for this Court to interpret the standard by which juvenile courts

should authorize an intrusion into the family home for investigatory purposes, this question is not presented under the facts of this moot case. This is not a case about a seizure of a child or a search conducted during the course of a DCYF investigation of alleged child abuse or neglect, which occurs separately from (though perhaps concurrently with) the initiation of a dependency proceeding. *Compare* RCW 26.44 (governing investigations) *with* RCW 13.34 (governing dependency proceedings). In this case, a dependency petition had been filed but not yet adjudicated. The order here permitted DCYF to visit with the child only once per month, either at the family home or at the child's day care. Visits at the home would require advanced notice and the presence of an Office of Public Defense or Tribal social worker, and DCYF was not authorized to search the home or question D.B.-K. This Court need not address the constitutional issue on the facts of this moot case.

Second, to the extent the Court does reach this issue, it should reject the probable cause standard D.B.-K. imports from

a Pennsylvania case which is both factually and legally distinct. That case relates to a specific procedure set out in Pennsylvania state law that does not exist in Washington. *Y.W.-B.*, 265 A.3d at 617. In Pennsylvania, when a county agency receives a report indicating that a child is not receiving proper care, the agency must conduct an "assessment" to "determine whether or not a child is in need of general protective services." 23 Pa.C.S. § 6375(c)(1); 55 Pa. Code § 3490.232(e). As part of its assessment, the county agency must perform a home visit. 55 Pa. Code § 3490.232(f); 23 Pa.C.S. § 6375(g). If the home visit is refused, the county agency may initiate court proceedings to obtain an order to compel. 55 Pa. Code § 3490.232(j); *see also* 23 Pa.C.S. § 6375(j). In that context, the Supreme Court of Pennsylvania determined that the agency must prove probable cause to believe that an act of child abuse or neglect has occurred and evidence relating to such abuse will be found in the home in order to obtain such an order. *Y.W.-B.*, 265 A.3d at 628.

The *Y.W.-B.* Court in part relied on the Third Circuit's decision in *Good v. Dauphin County Social Services for Children & Youth*, 891 F.2d 1087, 1093 (3d Cir. 1989), which D.B.-K. also cites here. *Y.W.-B.*, 265 A.3d at 619; Petition at 32. In *Good*, two police officers and two social workers entered and searched a home and strip-searched a child without a warrant or a warrant exception. 891 F.2d at 1089-90. Good brought a civil rights action, in which the social workers requested immunity. *Id.* at 1091. In that context, the Third Circuit applied the same probable cause standard as the standard developed in criminal cases.

Good involved a degree of intrusion far beyond what the court authorized here. In *Good*, the social workers entered the home with law enforcement without consent or court authority. *Y.W.-B.* and *Good* involve searches of the home conducted in the course of an investigation of child abuse allegations. *Y.W.-B.*, 265 A.3d at 609; *Good*, 891 F.2d at 1089. Similarly, D.B.-K. cites *Calabretta v. Floyd*, 189 F.3d 808, 810 (9th Cir. 1999) a Ninth Circuit case that involved a "coerced entry into a home to

investigate suspected child abuse, interrogation of a child, and strip search of a child, conducted without a search warrant and without a special exigency.".

In contrast to those investigative searches, the health and safety visits authorized by the court here did not authorize an invasive search of the home, mother, or child. In *Y.W.-B.*, the authorized search "allowed DHS investigators to search the home, including every room, closet and drawer in the home, based entirely upon their own discretion." *Y.W.-B.* 265 A.3d at 622. Here, the order permitted only one "eyes on" check of X.M.J. every 30 days. CP 129; RP 93-94. The court instructed, "The Department may only talk to and interact with the child during the health and safety check." CP 129. The court did not permit an interview of D.B.-K. or an inspection of the home. CP 129. The court required that either a tribal social worker or Office of Public Defense social worker be present (which required DCYF to plan any home visit in advance). CP 129. The purpose of the visits was not to investigate allegations of child abuse or

neglect, but to monitor X.M.J.'s safety and wellbeing while she remained in her mother's care pending adjudication of her dependency petition, which was expected to occur in approximately two months. 4/4/23 RP 84, 85-86, 93, 104. And, if D.B.-K. refused to consent, DCYF's remedy lay only in civil contempt remedies. *See RCW* 7.21.010. DCYF dismissed its case four days after the order entered. CP 130-32. The situations presented in the out-of-state cases cited by D.B.-K. are distinct from the facts here.

Under the facts of this case, to the extent D.B.-K. raises an issue of constitutional law or of substantial public interest, this case is not the right vehicle to take up those issues. This Court should decline review.

V. CONCLUSION

This Court should deny review.

This document contains 6,943 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 2nd day of April, 2025.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury of the State of Washington that on the below date the original Answer to Petition for Review to which this Declaration is attached was filed with the Supreme Court of the State of Washington through the Court's online filing system. An electronic copy was delivered to all parties of record through the 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 2nd day of April, 2025, at Everett, Washington.

KRISTEN SPARKS
Paralegal

ATTORNEY GENERAL'S OFFICE - EVERETT

April 02, 2025 - 4:25 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,922-1
Appellate Court Case Title:	In the Matter of the Dependency of: X.T.J. and X.M.J.
Superior Court Case Number:	23-7-00102-5

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