



dependency. The trial court denied her motion and dismissed the case. The mother appeals. Because the trial court's orders were not appealable as of right and discretionary review is not warranted, we dismiss the appeal.

The relevant facts, based mostly on filings by the Department, are as follows. Dustin Hamilton and Angela Pemberton are the parents of JH-K. At the time of the filing of the dependency, JH-K was 10 years old. While they never married, Hamilton and Pemberton were in a relationship for about 12 years. In late 2010, they broke up. Hamilton filed for custody of JH-K in Pierce County. He alleged that Pemberton had serious mental health issues and was a danger to JH-K. The family court in Pierce County awarded him temporary custody of JH-K and entered a protection order, barring Pemberton from physically contacting either JH-K or Hamilton.

In March 2011, JH-K talked to her mother on the phone. She said her father had touched her "privates" while they were both sleeping. JH-K said that her father was asleep at the time and that her father told her to not tell anyone what had happened. Pemberton reported the allegation. Child Protective Services and law enforcement began investigations, and the State took JH-K into protective custody. Hamilton denied the accusation. JH-K repeated that her father was asleep and said that he was not at fault and she was not afraid of him. According to a declaration from a social worker, the allegation was ruled founded. However, the prosecutor decided not to charge Hamilton.

The Department filed a dependency petition in King County family court

on March 15, 2011. The State alleged JH-K was abused and there was no parent, guardian, or custodian capable of adequately caring for her. RCW 13.34.030(6)(b), (c). The court entered an agreed shelter care order, and JH-K was placed under the supervision of the Department.

Ten days later, the Pierce County court noted it had been advised of the dependency petition. The Pierce County court entered an order staying the custody case and transferring the matter to the King County court until JH-K was returned to either parent.

In April, the King County court authorized continued shelter care. The case was continued several times. In late May 2011, the Department asked the court to grant concurrent jurisdiction to the Pierce County court. The Department hoped that a parenting plan could be entered and that the dependency matter could then be dismissed. The court granted the motion, finding that it was in the best interests of JH-K to grant concurrent jurisdiction to Pierce County court so a parenting plan could be entered.

The Pierce County court entered a final order on a residential schedule on June 29. The plan provided that JH-K would reside primarily with Pemberton. However, to the surprise of the Department, the order also provided that she would reside with her father every other weekend and during portions of school vacations. The court took note of the founded finding of inappropriate touching and ordered that while residing with her father, JH-K “shall not sleep with anyone or in Father’s bed.”

On the Department's motion, the King County court set a status conference hearing for July 22 to review the parenting plan and give the parties an opportunity to be heard. The Department submitted a declaration from a social worker stating concerns about the parenting plan because it allowed JH-K unsupervised visits with her father. The social worker also said that the Department planned to dismiss the dependency in the near future, that the Department felt the mother was an appropriate parent, and that dependency was not warranted.

Pemberton filed a response. She asked the King County court to find that its previous orders in the case still governed, to declare that any visits by the father with JH-K were unauthorized, and to place JH-K in her care. Hamilton filed a response asking the court to deny continuation of shelter care and to allow the parenting plan to be implemented.

The King County court held a hearing on July 22. After hearing from the parties, the court issued an oral ruling dismissing the case. Immediately after the court announced its oral ruling, Pemberton orally moved to substitute for the Department in the dependency, stating that JH-K was "not protected" and that there were "ongoing safety concerns in this case." The court denied the motion. The court later entered a written order stating that the "dependency has not been established and the petition is voluntarily dismissed by the Department pursuant to CR 41(a)." The court entered the following finding in its order denying Pemberton's motion for substitution:

On July 22, 2011, the mother moved to substitute in as

petitioner when the Department indicated its intent to dismiss. The Court decided that given the recent ruling in Pierce County granting the mother custody of the child and the father visitation, grounds for shelter care no longer existed, and therefore the motion for substitution was denied. The mother's petition would have to allege that the child has no "parent capable" which is in clear opposition to the Pierce County determination that both parents would have residential time.

Pemberton appeals the denial of her motion to substitute and the dismissal of the dependency. She claims the court was incorrect in its conclusion that grounds no longer existed for shelter care or dependency.

Pemberton is not entitled to appeal as a matter of right the court's order dismissing the dependency case. See RAP 2.2(a); In re Welfare of Watson, 23 Wn. App. 21, 23, 594 P.2d 947 (1979).

Pemberton asserts a right to direct appeal under RAP 2.2(a)(3), which allows an appeal as of right for any "written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." The orders in this case did not determine the action. The Department voluntarily dismissed its case under CR 41(a). As the State has acknowledged, the dependency action can be refiled by the Department or by any other party. Respondent's Brief at 5, 8. Similarly, the trial court's decision to deny Pemberton's oral motion to substitute in the action in place of the Department does not prevent Pemberton from filing her own action. And regardless, Pemberton has cited no authority that would allow substitution in these circumstances. We conclude review is not proper under RAP 2.2(a)(3). See In re Dependency of A.G., 127 Wn. App. 801, 807-08, 112 P.3d 588 (2005)

(dismissal without prejudice does not determine the action and prevent a final judgment), review denied, 156 Wn.2d 1013 (2006).

This court may treat the appeal as a motion for discretionary review and grant discretionary review under RAP 2.3(a) and (b). Watson, 23 Wn. App. at 23; A.G., 127 Wn. App. at 808. Pemberton has not argued that discretionary review is warranted, and we see no basis for holding that the criteria for discretionary review have been established. This is not a case like Watson, where discretionary review was granted in the best interest of the children. In that case, the dismissal of the State's petition substantially altered the status quo by restoring custody of two children to their mother, and the record indicated that removing the children from their current foster home might cause irreparable harm. The situation here is not equivalent. The child will continue living with Pemberton. Pemberton wanted an order forbidding JH-K from seeing her father, but the parenting plan entered by Pierce County court has already decided against imposing this restriction. As a party to the Pierce County case, Pemberton had a full and fair opportunity to litigate the issue of whether Hamilton's alleged abuse of JH-K meant he should not see JH-K. By giving Hamilton unsupervised residential time with JH-K, the court implicitly found JH-K was not in danger of being molested by her father. A dependency action is not to be used to relitigate custody and visitation disputes:

A dependency action is not an adjunct to a dissolution proceeding. It is not an additional procedural avenue down which a disgruntled dissolution litigant can march if he or she is dissatisfied with the trial court's disposition on custody and visitation disputes. A dependency action should not be used to

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thwart the lawful orders of a superior court in a dissolution action on matters of visitation.

In re Marriage of Rich, 80 Wn. App. 252, 258, 907 P.2d 1234 (1996), review denied, 129 Wn.2d 1030 (1996).

Because there is no right of direct appeal and the criteria for granting discretionary review are not established in the record, the appeal will not be considered.

Dismissed.

Becker, J.

WE CONCUR:

Schiveller, J.

Cox, J.