New York Law Journal

Mootness, A Motion for an Expedited Post-Deprivation Hearing in Family Court

While mootness is related to subject matter jurisdiction, case law has carved out exceptions to the rule. This article addresses the exception that brings into focus an instance "where the issue to be decided, though moot is (1) likely to recur..., (2) substantial and novel, and (3) will typically evade review in the courts."

By **Elliott Scheinberg** | June 25, 2020

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The doctrine of mootness is a strange creature in the universe of appellate review. Initially, "an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an

immediate consequence of the judgment." *Coleman ex rel. Coleman v. Daines*, 19 N.Y.3d 1087, 1092 [2012]. In essence:

> It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal . . . This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary. *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714–715 [1980].

"Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy." *Bruenn v. Town Bd. of Town of Kent*, 145 A.D.3d 878 [2d Dept 2016].

Subject Matter Jurisdiction

"Mootness is a doctrine related to subject matter jurisdiction and thus must be considered by the court sua sponte." *Matter of Grand Jury Subpoenas for Locals 17, 135, 257 and 608 of the United Bhd. of Carpenters and Joiners of Am., AFL-CIO*, 72 N.Y.2d 307, 311 [1988]. "[M]ootness is an issue that can be raised at anytime and, in fact, it is incumbent upon counsel to inform the court of changed circumstances which render a matter moot." *Weeks Woodlands Ass'n, Inc. v. Dormitory Auth. of State*, 95 A.D.3d 747, 753 [1st Dept 2012], affirmed, 20 N.Y.3d 919 [2012].

Exceptions To Mootness Rule

While related to subject matter jurisdiction, case law has carved out exceptions to the rule. [See E. Scheinberg, The New York Civil Appellate Citator, § 44 [NYSBA 2019]. The exception addressed in this article brings into focus an instance "where the issue to be decided, though moot, (1) is likely to recur, either between the parties or other members of the public, (2) is substantial and novel, and (3) will typically evade review in the courts." *Coleman*, supra, at 1090; *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 717 [1980]. There are other instances of exceptions that are beyond the spatial limitations of this article.

'In re F.W. (Monroe W.)'

The issue in *In re F.W.* (*Monroe W.*), 2020 NY Slip Op 02385 [1st Dept 2020], was whether Family Court properly denied the father's motion for an expedited hearing on a post-dispositional neglect proceeding to determine whether the children who were removed through a failed trial discharge should be returned to him. Despite the mootness of the issue, the Appellate Division reversed in accordance with the parent's and the children's right to due process and granted the father's motion.

The Facts

In April 2014, the Administration for Children's Services (ACS) filed a neglect petition against the father alleging acts of violence against the mother in the children's presence. In November 2014, Family Court entered a finding of neglect against the father. The children were released to the custody of their mother but were later placed in nonkinship foster care.

Following a motion by the father, in March 2016, the children were trial discharged to him, which means "that the child is physically returned to the parent while the child remains in the care and custody of the local social services district" (Family Court Act (FCA) §§1055[b][i][E]; 1089[d][2][viii][C]). There is no time limit on how long a child may reside with a parent on trial discharge status.

Several months later, the children were, again, removed from the father's care and placed back in nonkinship foster care based on an allegation of excessive corporal punishment, which was later determined "unfounded." In February 2017, Family Court, again, directed the agency to trial discharge the children to the father.

In January 2018, ACS, again, removed the children from the father based on another allegation of corporal punishment. The father filed another order to show cause for an "expedited hearing to determine whether the children [ ] can be returned to their home with their father."

On January 26, 2018, the parties appeared before Family Court, whereupon the issue of the father's entitlement to an expedited hearing arose. The Attorney for the Children (AFC) stated that she was not ready to participate in a hearing, as she had not yet spoken to the children and was "double booked"—she also did not believe that the father was entitled to an expedited hearing as the matter was post-disposition. The court requested to be briefed on the issue.

Two weeks later, on Feb. 14, 2018, the hearing commenced and took six months to complete. On April 4, 2018, the father requested a decision on his motion for an expedited hearing. The court stated that that application became moot as the court "granted an expedited hearing" and they were "just in the midst of it." The father responded that the court had "granted the beginning of an expedited hearing and gave everyone a chance to do replies," referring to the directive of the court from January 2018. The court did not respond.

Throughout the next few months the father's counsel repeatedly asked for earlier dates for the continued hearing. In his summation, the father did not ask for a ruling on the timing of the hearing, and instead stated that the "court was correct to grant an expedited hearing."

In August 2018, Family Court issued a bench decision finding that the allegations against the father were not credible, and directed a conditional trial discharge. The children were finally discharged to the father on March 25, 2019.

In a subsequent memorandum decision, dated Sept. 24, 2018, the court denied the branch of the father's application for an expedited hearing. The court reasoned that FCA §1089, which is triggered by the court's determination after a dispositional hearing that placement of a child with the Commissioner of ACS is in the child's best interest, does not qualify its references to a hearing, nor does it provide for an expedited hearing.

Thus, in the absence of an express statutory provision granting a parent the right to a hearing within a specific time thereafter, Family Court rejected the father's argument that he was entitled to a hearing within a "matter of days," holding that the court has "broad discretion to determine the time to hold a hearing." Family Court also noted that the father was afforded due process at the fact-finding and dispositional hearing stages and that he did not address its earlier statement that the motion seeking an expedited hearing was moot.

Appellate Division Reversed

Although the merits were not before the Appellate Division, the First Department, citing *Hearst Corp v. Clyne*, above, decided the appeal because the issues fell into an exception to the mootness doctrine in that they (1) are likely to reoccur; (2) typically evade review; and (3) involve significant or important questions not previously passed on.

The Appellate Division began "with the undisputed principle that a parent's interest 'in the care, custody, and control of their children[ ] is perhaps the oldest of the fundamental liberty interests' (Troxel v. Granville, 530 U.S. 57, 65 [2000])":

> Accordingly, parents are afforded the protections of the Due Process Clause of the 14th Amendment in protecting this interest (id. at 66; Matter of Marie B., 62 N.Y.2d 352, 358 [1984]). Similarly, children have a parallel "right to be reared by [their] parent" (Matter of Bennett v. Jeffreys, 40 N.Y.2d 543, 546 [1976]).

While rejecting ACS's argument that, in light of the prior finding of neglect against the father, the government had a greater interest in ensuring a correct adjudication, even if that lengthened the proceeding, the Appellate Division agreed that "ACS has an interest in correct adjudications because an erroneous failure to place the child [in foster care] may have disastrous consequences"—nevertheless, the First Department stated that "this concern must be weighed against the 'significant emotional harm' inflicted upon children by temporarily separating them from their parents":

> We find that a parent's private interest in having custody of his or her children, the children's private interest in residing with their parent, and the undisputed harm to these interests are factors that merit equal consideration.

The record showed that ACS had failed to establish that the lengthy delay was related to its interest in protecting the children or hearing related issues:

> Rather, the hearing was prolonged over six months because of the court's and attorneys' scheduling conflicts. There is no indication that the completion of the hearing was caused by difficult legal issues, or by the need to obtain elusive evidence, or by some other factor related to an accurate assessment of the best interest of the children.

The Appellate Division stated that "strict due process safeguards apply in post-dispositional matters as they do in neglect proceedings":

> "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State" (Santosky v. Kramer, 455 U.S. 745, 753 [1982]).
>
> This rationale equally applies to the primacy of a parent's fundamental liberty interest, and the importance of procedural due process in protecting that interest, particularly when a parent and child are physically separated (cf. Matter of Elizabeth C., 156 AD3d at 203). Accordingly, we find that a parent is entitled to a prompt hearing on the agency's determination to remove the children from his or her physical custody through a failed trial discharge.

Caseload, Time Frames

The Appellate Division noted that although the Family Court Act is silent as to the specific procedural time frames that apply when a child has already been removed from a parent's physical custody after a fact-finding determination it would not impose a specific time frame as to what constitutes a 'prompt' or 'expedited' judicial review. The Appellate Division further "recognize[d] that Family Court has a large caseload with competing deadlines which may cause *slight* delays":

> Instead, we rely on the general precept that a post-deprivation hearing "should be measured in hours and days, not weeks and months," based on the facts and circumstances of the matter, citing Egervary v. Rooney, 80 F Supp 2d 491, 503 [ED Pa 2000], revd on other grounds, 366 F3d 238 [3d Cir2004]).
>
> We do not hold that in every instance a hearing that takes "weeks and months" is inappropriate, especially when there is a sound basis for delay. Rather, there should be a case-by-case evaluation, but the court should value promptness whenever possible.

Because there was no formal denial until Family Court's written order, from which the father appealed, the Appellate Division rejected ACS' argument that the father should have immediately appealed Family Court's denial of the father's request for an expedited hearing. We must resist ACS' invitation to buy its argument of implied severance, which is wholly inapplicable here, *Burke v Crosson*, 85 NY2d 10, 16-17 [1995], and beyond the scope of this article. [See E. Scheinberg, Finality and Implied Severance, Interlocutory Orders, Final Orders, NYLJ, February 11, 2020.]

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