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Exception to the Mootness Rule: Article 78, Compelling Timely Family Court Determinations

'Liu' adds a little known arrow into the quiver of parents who have petitioned Family Court for child support and are then, not uncommonly, relegated to delayed determinations beyond statutory timelines.

By **Elliott Scheinberg** | July 21, 2022

Elliott Scheinberg. Courtesy photo

In *Liu v. Ruiz*, 2021 NY Slip Op 06089 (1st Dept. 2021), the Appellate Division, First Department, reaffirmed its ruling in *Matter of Solla v. Berlin*, 106 A.D.3d 80 (1st Dept. 2013), rev'd on other grounds, 24 N.Y.3d 1192 (2015)), by extending it to a Family Court proceeding involving mootness. *Solla* held that, under the State Equal Access to Justice Act (CPLR 8600 et seq. (EAJA)), "the plaintiff or petitioner in an action or proceeding against the State is considered to have 'prevailed' for purposes of collecting attorneys' fees if commencement of the litigation 'catalyzed' the State into voluntarily offering to him or her, in substantial part, the relief that he or she was seeking":

> [In *Solla*] [w]e determined that the "catalyst theory" gave life to what we identified as the purpose behind the statute, which was "to level the playing field for those without the necessary resources to challenge State action

> through litigation" (24 NY3d at 85). The Court of Appeals reversed our decision [] because it found that [] the State did not actually change its position.
>
> However, it explicitly declined to decide whether the catalyst theory is available as a method of recovering attorneys' fees under the State EAJA ... We hold that petitioner was the prevailing party for purposes of recovering her fees and that the petition was improperly dismissed as moot.

The Mootness Doctrine

"[A]n 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, 714-15 (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." *Matter of Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172 (2002).

Exceptions to the Mootness Rule

"[A]n exception to the doctrine discloses three common factors: (1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues." *Hearst v. Clyne*, 50 N.Y.2d 707, 714-15 (1980).

Mootness Is Related to 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 any time and, in fact, it is incumbent upon counsel to inform the court of changed circumstances which render a matter moot." *Weeks Woodlands Ass'n v. Dormitory Auth. of State*, 95 A.D.3d 747, 753 (1st Dept. 2012), affirmed, 20 N.Y.3d 919 (2012).

'Liu v. Ruiz'

Liu involves a byzantine series of incidents where a mother's petition for enforcement of a child support order for an autistic child languished in Family Court for nearly seven years. The First Department focused on Family Court's uncertain and unmeasured periods of decision making beyond statutory timelines and allowed her appeal for counsel fees, under state EAJA, to proceed as an exception to the mootness doctrine, after she successfully compelled Family Court to comply with statutory timelines.

This case had been previously reviewed on appeal, *Matter of N.L. v. S.L.*, 188 A.D.3d 491 (1st Dept. 2020). In March 2012, the father was ordered to pay monthly child support and a retroactive lump sum amount. In December 2012, the mother filed a violation petition, asserting willful violation of the order because the father had not made one payment. A willfulness hearing commenced in December 2013. "However, for various reasons, including the retirement of the first two support magistrates who presided over the matter, and the father's default and later successful motion to vacate his default, the mother's petition was not decided until nearly seven years later, on or about Nov. 15, 2019, at which time the Support Magistrate found that the father had willfully failed to pay a total of $830,668.37 in support and recommended incarcerat[ion] for six months unless he paid a purge amount of $84,000 by Dec. 16, 2019. On Dec. 16, 2019, he paid the purge amount."

On Dec. 20, 2019, the mother filed objections, arguing that the amount was insufficient, and that the Support Magistrate should have set a payment schedule:

"Family Court denied the objections on Feb. 3, 2020, determining that the Support Magistrate's recommendations had been "implicitly confirmed" when the purge amount was accepted by another Family Court judge in lieu of an order of commitment, and thus [] the objections [were] not properly before the court ... The mother appealed, this Court reversed and remanded the matter for consideration of the mother's objections on the merits."

On Feb. 5, 2020, petitioner filed another child support violation petition. On Oct. 15, 2020, after a hearing, the Support Magistrate issued findings of fact, concluding that the father did not willfully violate the order. On Nov. 13, 2020, the mother served objections to those findings. The First Department noted that although FCA §439(a) mandates that a ruling on objections is required to be issued no more than 15 days later, a Family Court judge had not even been assigned to the matter when 15 days elapsed.

On Dec. 28, 2020, the mother commenced a proceeding in Supreme Court, by order to show cause, pursuant to CPLR 7803(1), seeking mandamus relief against Judge Jeanette Ruiz, in her official capacity as Chief Administrative Judge of the New York City Family Court (CAJ), to compel a decision on her objections, in compliance with §439(e). The mother claimed that because the child, now 15 years old, is autistic and has more than $8,000 in monthly expenses, not receiving child support was "crushing." She also sought reasonable counsel fees under CPLR 8601(a), including as "a catalyst to obtaining finally a decision on the objections."

On the same day the mother's order to show cause was signed, Judge Valerie Pels was assigned to the support proceeding. Judge Pels decided favorably on the mother's objections 14 days after her assignment finding that the evidence established that the father

had willfully violated the 2012 order, and that an order of commitment was appropriate. Three days later, the state, on behalf of the CAJ, cross-moved to dismiss the Article 78 proceeding, asserting mootness since the mother had received the requested relief, and, on the merits, that the CAJ had discretion to manage the Family Court's docket as she saw reasonably fit during the COVID-19 pandemic. The Article 78 court denied the petition as academic, dismissed the proceeding as moot, and declined to award counsel fees.

Exception to the Mootness Rule. The mother argued that this issue was likely to occur again and to evade review because it was not even the first time in the proceeding that the Family Court had violated §439(e)'s 15-day rule—"After all, the Family Court did not issue any determination on the mother's December 2019 objections until over one month later":

"The mother further notes that §439(e) will likely be implicated again in this proceeding, given the father's willful indifference to his support obligations;

The mother also asserts that in cases other than her own it is routine for the Family Court to disregard the mandatory deadline;

She adds that, because of the ease with which a court can resolve a parent's attempt to force a ruling on her objections to a final support order, it is likely to evade review; and

Finally, she claims the question is significant because it is critical to parents seeking to enforce support obligations that resolution be achieved in a quick and efficient manner."

Recipient Parents and Payor Parents Should Know How Soon 'Finality on the Amount in Question Will Be Forthcoming'. The First Department determined an exception to the mootness rule applied:

"The mother has established that this is not the first time in this case that the issue has arisen. Further, the issue is not likely to be resolved without application of the exception, because the Family Court can so easily obviate it by issuing a decision on the objections, albeit after the expiration of the 15 days. Courts have applied the exception under similar circumstances ... (*Matter of Elizabeth C. (Omar C.)*, 156 A.D.3d 193, 202 (2d Dept. 2017); *Matter of Lucinda R. (Tabitha L.)*, 85 A.D.3d 78, 83-84 (2d Dept. 2011)).

Those cases involved FCA §1028, which requires that the Family Court hold a hearing within three days of an application to return a child who has been removed from the home. Each case was rendered academic because in *Matter of Lucinda R.* the child was returned to the home after the three days had elapsed but before the court could determine the appeal, and in *Matter of Elizabeth C.* the father, who challenged his own removal from the home, was permitted to return after the appeal had been submitted. *Nevertheless, the court found in each case that the issues presented were not uncommon in Family Court and decided them.*"

The court "also found that the mother raise[d] an important and substantial question":

"Whether the Family Court is actually mandated to decide objections to support orders within the short time frame set forth in the statute is not a trivial one.

Parents relying on support payments or ordered to make them should know if finality on the amount in question will be forthcoming within days, months or years of the issuance of a final support order, since the answer might have a profound effect on choices they make.

We disagree with the CAJ that in (*Martinez v. DiFiore*, 188 A.D.3d 605 (1st Dept. 2020), lv. dismissed in part, denied in part 37 N.Y.3d 1012 (2021)) this Court decided that a court cannot issue a writ of mandamus under the circumstances presented here. That case was distinguishable in that it dealt with Uniform Rules for Family Court (22 NYCRR) §205.43, which imposes a 90-day deadline from the date of the summons by which support magistrates "must" conclude a hearing to determine willful nonpayment of child support. This Court observed that, through its allowance for adjournments for good cause shown, the rule permitted judges and magistrates to exercise discretion to extend the time when the 90-day rule could not possibly be adhered to. Our decision relied on the notion that "[a] writ of mandamus lies 'only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law' " (188 A.D.3d at 606, 132 N.Y.S.3d 744, quoting *Alliance To End Chickens as Kaporos v. New York City Police Dept.*, 32 N.Y.3d 1091, 1093 (2018), cert. denied, 139 S. Ct. 2651 (2019)). The statute at issue here, which leaves no room for discretion, is a provision that 'enforce[s] a clear legal right.'"

The court further determined that §439(e) was violated against Ms. Liu:

"The statute is mandatory insofar as it plainly states that the court "shall," within 15 days of an objection to a support award being fully submitted, issue a ruling on it (*Rubin v. Della Salla*, 107 A.D.3d 60, 67 (1st Dept. 2013) [interpreting the word "shall" as "undeniably" reflecting "the mandatory nature of the statutory language" at issue)). The CAJ disagrees that the mandate in the statute applies to the scenario presented here, because it is directed to the court itself, not court administration. Surely, however, the legislature's intention that the court act in a timely fashion presupposed that the administrator would have assigned a judge to hear the matter. To adopt the CAJ's argument would leave a gaping hole in the statutory framework that would defeat the implicit goal of promoting speedy resolution of support matters."

The First Department reversed the judgment of the Supreme Court, on the law, reinstated the petition and remanded the matter for further proceedings in accordance with the decision.

'In re F.W.'

In *In re F.W.*, 183 A.D.3d 276 (1st Dept. 2020), notwithstanding its recognition of Family Court's heavy caseloads, the First Department, rebuked the court for undue delays, albeit not of a statutory origin, and similarly allowed an appeal to proceed as an exception to the mootness rule.

The procedural events in *F.W.* were convoluted. The issue 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 had been removed through a failed trial discharge, should be returned to him. Even though the children had been returned to the father, the First Department reversed in accordance with the parent's and the children's strict rights to due process safeguards and granted the father's motion.

Facts. The Administration for Children's Services (ACS) filed a neglect petition against the father alleging violence against the mother in the children's presence. In November 2014, Family Court entered a finding of neglect against him. The children were released to their mother but were later placed in nonkinship foster care. In March 2016, the children were trial discharged to the father while remaining in the care and custody of the local social services district (Family Court Act (FCA) §§1055(b)(i)(E); 1089(d)(2)(viii)(C)).

Months later, the children were, again, returned to nonkinship foster care based on unfounded allegations of excessive corporal punishment. Family Court, again, trial discharged the children to the father. In January 2018, ACS removed the children based on another allegation of corporal punishment. The father filed an order to show cause for an "expedited hearing," entitlement to which was addressed on Jan. 26, 2018. The Attorney for the Children could not 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 hearing commenced two weeks later but took six months to complete. On April 4, 2018, the father requested a decision on his motion for an expedited hearing. Family Court stated that that application became moot once the court "granted an expedited hearing". The father responded that the court had "granted the beginning of an expedited hearing and gave everyone a chance to do replies." The court did not respond.

The father repeatedly requested earlier dates for the continued hearing. In August 2018, Family Court issued a decision that the allegations were not credible and directed a conditional trial discharge. The children were finally discharged to him on March 25, 2019.

In a subsequent memorandum decision, in September 2018, Family Court denied that branch of the father's application for an expedited hearing because "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, absent 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'":

"[A]lthough the children were ultimately discharged to the father, after a six-month hearing, the issues raised on this appeal fall 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" (*Hearst v. Clyne*, 50 N.Y.2d 707, 714-15 (1980)).

* * *

[A]CS fails to establish that the lengthy delay was related to its interest in protecting the children. 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 (generally *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 242 (1988)." *F.W.* at 279-81.

'Post-Deprivation Hearing Should Be Measured in Hours and Days, Not Weeks and Months'. Although mindful "that family courts in many counties across the state have crushing caseloads, extremely difficult family issues to decide, and limited time to make fair and informed determinations in what are often chaotic and highly charged emotional cases," *Alix A. v. Erika H.*, 45 A.D.3d 394, 394-95 (1st Dept. 2007), and, again, in *In re F.W.* n. 5, "Family Court has a large caseload with competing deadlines which may cause slight delays," the First Department (*F.W.*, at 281), nevertheless, underscored: "[T]he FCA 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. We decline to impose a specific time frame as to what constitutes a "prompt" or "expedited" judicial review. 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."

Conclusion

Liu adds a little known arrow into the quiver of parents who have petitioned Family Court for child support and are then, not uncommonly, relegated to delayed determinations beyond statutory timelines.

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