

NO. 27580

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

LILY E. HAMILTON, on behalf of  
AMBER J. LETHEM, a minor, Petitioner-Appellee, v  
CHRIS L. LETHEM, Respondent-Appellant

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STATE OF HAWAI'I

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APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT  
(FC-DOMESTIC ABUSE NO. 05-1-1977)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., and Leonard, J.;  
and Foley, J., dissenting)

Defendant-Appellant Chris Lethem (**Father**) appeals pro se from a temporary restraining order filed against him in the Family Court of the First Circuit (**Family Court**).<sup>1</sup>

On September 23, 2005, Lily Hamilton (**Mother**), on behalf of her fifteen-year-old daughter, filed an ex parte petition for a temporary restraining order against Father under Hawaii Revised Statutes (**HRS**) § 586-3 (1993 & Supp. 2004).<sup>2</sup>

<sup>1</sup> The Honorable Darryl Y.C. Choy presiding.

<sup>2</sup> § 586-3. Order for protection.

(a) There shall exist an action known as a petition for an order for protection in cases of domestic abuse.

(b) A petition for relief under this chapter may be made by:

(1) Any family or household member on the member's own behalf or on behalf of a family or household member who is a minor or who is an incapacitated person as defined in section 560:5-102 or who is physically unable to go to the appropriate place to complete or file the petition; or

(2) Any state agency on behalf of a person who is a minor or who is an incapacitated person as defined in section 560:5-102 or a person who is physically unable to go to the appropriate place to complete or file the petition on behalf of that person.

(c) A petition for relief shall be in writing upon forms provided by the court and shall allege, under penalty of perjury, that: a past act or acts of abuse may have occurred; threats of abuse make it probable that acts of abuse may be imminent; or extreme psychological abuse or malicious property damage is imminent; and be accompanied by an affidavit made under oath or a statement made under penalty of perjury

(continued...)

Father allegedly had physically and psychologically abused the daughter on and prior to August 25, 2005, by striking her during a heated argument about the daughter's assisting a friend in obtaining a birth control product. The temporary restraining order (TRO), granted on September 23, 2005, had an expiration date of December 22, 2005.

At a hearing on October 5, 2005, the Family Court found the TRO was justified and held that no further action was necessary. In its Order Regarding Temporary Restraining Order, filed the same day, the court declared no further action would be taken and that the TRO would expire on its own on December 22, 2005. Father filed a timely notice of appeal on November 3, 2005.

On appeal, Father maintains various points of error, arguing, *inter alia*, the Family Court improperly granted the TRO against him, the Family Court's Findings of Facts and Conclusions of Law are erroneous, and the *ex parte* temporary restraining order process is unconstitutionally gender-biased.

Mother contends Father's appeal is moot because the TRO expired on December 22, 2005. In response, Father argues that his appeal is not moot because the "capable of repetition, yet evading review" and/or "collateral consequences" exceptions to the mootness doctrine apply to the facts of this case.

Upon carefully reviewing the record and briefs submitted and having given due consideration to the arguments advanced and the issues raised by the parties, we hold that:

Father's appeal is moot. It is well-settled under Hawai'i law that:

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<sup>2</sup>(...continued)

stating the specific facts and circumstances from which relief is sought.

(d) The family court shall designate an employee or appropriate nonjudicial agency to assist the person in completing the petition.

[a] case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where events...have so affected the relations between the parties that the two conditions for justiciability relevant on appeal-adverse interest and effective remedy-have been compromised.

Okada Trucking Co., Ltd. v. Board of Water Supply, 99 Hawai'i 191, 195-96, 53 P.3d 799, 803-04 (2002) (citations omitted). Thus, "the suit must remain alive throughout the course of litigation to the moment of final appellate disposition to escape the mootness bar." Kaho'ohanohano v. State, 114 Hawai'i 302, 332, 162 P.3d 696, 726 (2007) (citations omitted).

Here, the expiration of the TRO on December 22, 2005 prevents this court from providing an effective remedy. See In re Doe Children, 105 Hawai'i 38, 56, 93 P.3d 1145, 1163 (2004) (holding that the two conditions for justiciability on appeal are adverse interest and effective remedy); In re McCabe Hamilton & Renny Co., Ltd. v. Chung, 98 Hawai'i 107, 117, 43 P.3d 244, 254 (App.2002) (stating that the appellate court cannot extinguish an injunction that is already extinguished).

Hawai'i recognizes various exceptions to the mootness doctrine. One exception is available where the issue is "capable of repetition, yet evading review." In re Thomas, 73 Haw. 223, 226, 832 P.2d 253, 255 (1992) (noting that the exception applies where "a challenged governmental action would evade full review because the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit").

The exception does not apply in this case because: (1) the dispute in this case is of a private nature and it does not involve questions that affect the public interest; and (2) there is no reasonable expectation that the precise factual situation underlying this dispute is likely to recur and, therefore, the facts in this case are not capable of repetition, yet evading review, within the meaning of the recognized exception to

mootness. See McCabe Hamilton & Renny Co., Ltd. v. Chung, 98 Hawai'i 107, 118-19, 43 P.3d 244, 255-56 (App. 2002); In re Thomas, 73 Haw. 223, 226, 832 P.2d 253, 255 (1992); In re Waikoloa Sanitary Sewer Co., Inc., 109 Hawai'i 263, 270, 125 P.3d 484, 491 (2005).

Another exception to the mootness doctrine has been applied where "the case appealed has substantial continuing collateral consequences on the appellant."<sup>3</sup> In re Doe, 81 Hawai'i 91, 99, 912 P.2d 588, 596 (1996) (citation omitted). Here, however, Father claims generally that proceedings related to custody and visitation of the daughter may be affected by the issued TRO. He also claims reputational harm from the TRO and the related findings. At this point, the daughter is no longer a minor and Father's claims that he will suffer negative collateral consequences are too speculative to show that he will suffer substantial continuing collateral consequences from the September 23, 2005 TRO.

Moreover, we do not believe that the exception must be invoked in order to afford a party "some practical relief in the future." In McCabe Hamilton & Renny Co., Ltd. v. Chung, 98 Hawai'i 107, 43 P.3d 244 (App. 2002), we held that an appeal over an expired TRO is indeed moot. Nevertheless, we concluded that

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<sup>3</sup> Father cites Putman v. Kennedy, 279 Conn. 162, 900 A.2d 1256 (2006), in support of his argument that the negative collateral consequences of an expired TRO must except his appeal from mootness. In Putman, the Connecticut Supreme Court, after reviewing opinions from other jurisdictions, concluded it was the "majority" opinion that expired restraining orders are not rendered moot because there is a "reasonable possibility" that the orders could affect the reputation and legal record of the defendant. Id. at 167-72, 900 A.2d at 1260-63. The court held:

Where there is no direct practical relief available from the reversal of the judgment, as in this case, the collateral consequences doctrine acts as a surrogate, calling for a determination whether a decision in the case afford the litigant some practical relief in the future.

Id. at 169, 900 A.2d at 1261.

the appropriate solution is to vacate the underlying orders that provided the expired temporary injunctive relief in order to prevent any potential future legal or collateral consequences for the party who was the subject of the mooted relief. We reasoned:

[T]he imposition of issue preclusion where appellate review has been frustrated due to mootness is obviously unfair. In such cases, we have held that in order to avoid such a result, the solution lies in the adoption of the federal practice of having the appellate court vacate the judgment of the trial court and direct dismissal of the case.

... This will prevent the orders, which are unreviewable because of mootness, from spawning any legal consequences.

McCabe, 98 Hawai'i at 121-22, 43 P.3d at 258-59 (internal citations, quotation marks, and paragraphing omitted); see also Exit Co. Ltd. P'ship v. Airlines Capital Corp., Inc., 7 Haw.App. 363, 766 P.2d 129 (1988) (to avoid unfairness that could result from imposition of issue preclusion stemming from mooted writ of possession, the court vacated the judgment of the trial court and directed dismissal of the case); Aircall of Hawaii, Inc. v. Home Props., Inc., 6 Haw.App. 593, 733 P.2d 1231 (1987) (to avoid spawning any legal consequences from an order finding a waiver of attorney-client privilege, the appeal from which was rendered moot through no fault of appellant, the court vacated the order and remanded with direction to dismiss the action).

In light of McCabe, we conclude that Father's appeal from the September 23, 2005 TRO (and the related orders) is moot and we do not reach the merits of his points on appeal. See Johnston v. Ing, 50 Haw. 379, 381, 441 P.2d 138, 140 (1968) (noting that "appellate courts will not consider moot questions"). In reaching this conclusion, we note that the mootness of this case was not the result of any action taken by father. Because we are unable to reach the merits of Father's claim, we vacate the Family Court's orders so that they will not have any issue preclusive effect.

IT IS HEREBY ORDERED that the Family Court's September 23, 2005 TRO, October 5, 2005 Order Regarding the Temporary

Restraining Order, and March 3, 2005 Findings of Fact and Conclusions of Law are vacated and the case is remanded to the Family Court with direction to dismiss the action.

DATED: Honolulu, Hawai'i, May 16, 2008.

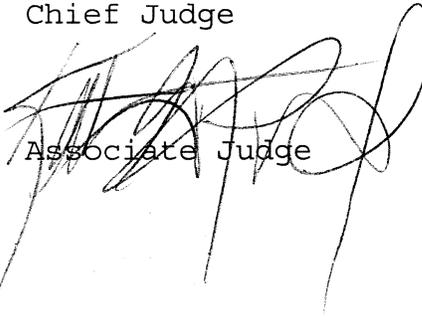
On the briefs:

Chris L. Lethem  
Pro-Se Respondent-Appellant.

Stephen T. Hioki  
for Petitioner-Appellee.



Chief Judge



Associate Judge