

CONCURRING OPINION BY ACOBA, J.

I agree with Chief Justice Moon that the judgment of the Intermediate Court of Appeals (ICA) should be vacated and the case remanded to the ICA with instructions to address the merits of the petition of Petitioner/Defendant-Appellant Chris L. Lethem (Father). See majority opinion at 29. I am also in agreement that the collateral consequences exception to the mootness doctrine is accurately applied to the facts of this case. See id. at 16-26. However, the limitations that the majority opinion purports to place on the public interest exception to the mootness doctrine are of concern. See id. at 14-16. Our cases have not indicated that the exception should be interpreted so narrowly, and, therefore, I write separately to point out that this case may properly fall under the public interest exception, as well as the collateral consequences exception, to the mootness doctrine.

I.

The public interest exception was first recognized in this court's jurisprudence in Johnston v. Inq, 50 Haw. 379, 441 P.2d 138 (1968). In Johnston, the court outlined three criteria relevant to the determination of whether a particular case falls under the exception: (1) "the public or private nature of the question presented"; (2) "the desirability of an authoritative determination for future guidance of public officers"; and (3) "the likelihood of future recurrence of the question." Id.

at 381, 441 P.2d at 140. The public interest exception has continued to be applied in subsequent cases, sometimes melded with the observation that similar cases were likely to become moot thereby escaping review, and more recently, as a distinct exception. See, e.g., Kaho'ohanohano v. State, 114 Hawai'i 302, 333-34, 162 P.3d 696, 727-28 (2007); Okada Trucking Co., Ltd. v. Bd. of Water Supply, 99 Hawai'i 191, 195-98, 53 P.3d 799, 803-06 (2002); Life of the Land v. Burns, 59 Haw. 244, 580 P.2d 405 (1978). Because the mootness doctrine is a self-imposed, prudential limitation on this court's powers, the public interest exception is significant in that it permits this court to resolve important constitutional questions and other matters of public interest, and to establish clear rules of conduct in such matters. See United Pub. Workers v. Yogi, 101 Hawai'i 46, 60-61, 62 P.3d 189, 203-04 (2002) (Acoba, J., concurring); see also Avis K. Paoi, Hawaii's Justiciability Doctrine, 26 U. Haw. L. Rev. 537, 551-52, 572-74 (2004) (advocating a flexible approach to justiciability in order to allow access to justice and to allow the court to give guidance on important public matters).

There appeared for a time to be confusion as to whether the public interest exception was distinct from the "capable of repetition, yet evading review" exception. See Yogi, 101 Hawai'i at 58-62, 62 P.3d at 201-05 (Acoba, J., concurring); see also Paoi, Hawaii's Justiciability Doctrine, 26 U. Haw. L. Rev. at 549-52 (recognizing that "Hawai'i cases have not settled on a

concrete application of these two exceptions[]"). However, this court recently confirmed that the public interest exception, which embodies the three elements outlined in Johnston, exists separate and apart from the "capable of repetition, yet evading review" exception. See, e.g., Doe v. Doe, 116 Hawai'i 323, 327, 172 P.3d 1067, 1071 (2007); Kaho'ohanohano, 114 Hawai'i at 333, 162 P.3d at 727.

II.

The majority properly recognizes the public interest exception as distinct, and analyzes it as such. Respectfully, however, the majority adopts a far too narrow definition of "public" in applying the first prong of the three-pronged public interest test. See majority opinion at 14-16. The majority finds that "the question presented is of a private nature." Id. at 15. Therefore, it eschews application of the public interest exception to Father's appeal on the ground that "it fails to meet the first prong of the public interest exception"; and thereby affirms the ICA's determination that "Father's appeal 'does not involve questions that affect the public interest.'" Id. at 16 (quoting SDO at 3).

This restrictive view of the public interest exception overlooks the purposes behind the exception, and in particular disregards our recent opinion in Doe. Doe involved a dispute between a child's grandparents and mother over visitation rights pursuant to HRS § 571-46.3. Doe, 116 Hawai'i at 327, 172 P.3d at

1071. While we found that "the underlying proceedings are, at bottom, a private battle between Mother and Grandparents over whether Grandparents' access to Child is in Child's best interest," we recognized that the family court's invalidation of the visitation statute presented a matter of wide public concern because "the family court's ruling stands to affect the fundamental rights of many Hawai'i families." Id.

Similarly, the underlying facts in this case, of a civil dispute between Respondent/Plaintiff-Appellee Lily E. Hamilton and Father over Father's right to discipline and to participate in the raising of his children, involve a private matter. See majority opinion at 2, 4-5. However, the central issue presented on appeal is whether a parent has a right to the parental discipline defense in Temporary Restraining Order (TRO) proceedings. See id. at 5-6. This question is not merely "personal to Father," as the majority contends, id. at 15, but implicates the broader constitutional right to raise one's children, manifestly a matter of public concern to Hawai'i and its families. See, e.g., In re Doe, 99 Hawai'i 522, 532-34, 57 P.3d 447, 457-59 (2002) (affirming parents' "substantive liberty interest in the care, custody, and control of their children" under the due process clause of the Hawai'i constitution). As argued by Father, this issue implicates "the fundamental rights of many Hawai'i families . . . specifically given the conflict between a parent applying for a HRS [chapter] 586 *ex parte* TRO,

on behalf of a minor, based on the other parent exercising [his or her] parental rights to discipline . . . [his or her] child." But under the majority's rationale, a case could be dismissed as falling outside the public interest exception because the facts of the case make it personal to the parties involved. Where fundamental constitutional rights are at issue, however, the public interest exception is entirely appropriate to apply inasmuch as the purpose of recognizing such an exception is to provide needed guidance on fundamental issues of public importance, even though arising in the context of a private dispute.

Because the majority disposed of this issue based on the first prong of the exception, the opinion does not address the remaining two prongs. Application of those prongs to the facts of this case further illustrates the importance of allowing an exception to the mootness doctrine as in the public interest in this case. As to "the desirability of an authoritative determination for future guidance of public officers," our family courts would undoubtedly benefit from a decision on the merits as to whether a parental discipline defense is appropriate in TRO proceedings. As for "the likelihood of future recurrence of the question," it is highly likely, if not certain, that the fundamental question of a parent's right to discipline and participate in the raising of his or her child will arise in the

context of future TRO proceedings.¹ Just as the family court in Doe found the grandparent visitation statute to be unconstitutional, thereby affecting the rights of other families in similar future proceedings, here the family court found that a parental discipline defense is not appropriate in TRO proceedings, precluding its use by future defendants, and thereby affecting the parental rights of future litigants. A TRO is a serious limitation on a parent's fundamental rights, and future parties, counsel and our courts must have direction as to the circumstances that warrant the imposition of such a sanction. The public interest exception to the mootness doctrine, accordingly, is also germane to this case.



¹ Although, as previously mentioned, the public interest exception is distinct from the capable of repetition, but evading review exception, the problem of a likely recurrence is compounded here by the fact that TROs are usually too short in duration to be capable of appellate review, absent an exception such as the public interest exception. See majority opinion at 15 ("We believe that a TRO, by its very nature, will always evade review because it would, as it did here, expire within the initial ninety-day term.").