The Mootness Doctrine and the Public-Interest Exception

When is an appeal no longer a dispute? When it has become moot—that is, when “the issues presented in the trial court no longer exist because events subsequent to the filing of the appeal render it impossible for the reviewing court to grant the complaining party effectual relief.” Bettis v. Marsaglia, 2014 IL 117050, ¶ 8 (citing Jackson v. Board of Election Commissioners, 2012 IL 111928, ¶ 28). The mootness doctrine ordinarily requires the court to dismiss such an appeal as moot, as reviewing courts are reluctant to review cases “merely to establish a precedent or guide future litigation.” See In re Marriage of Donald B., 2014 IL 115463, ¶ 23 (quoting Madison Park Bank v. Zagel, 91 Ill. 2d 231, 235 (1982)). An exception to the mootness doctrine, however, allows a court to resolve an otherwise moot issue that involves “a substantial public interest.” Bettis, 2014 IL 117050, ¶ 9 (citing Wisnasky-Bettorf v. Pierce, 2012 IL 111253, ¶ 12).

In some cases, there is room for argument as to whether an appeal is moot—and even if it is, whether the legal dispute at issue in the appeal concerns a substantial public interest and should be decided on the merits. This edition of the Appellate Practice Corner addresses three recent cases in which the supreme court discussed what does or does not prevent a reviewing court from granting effectual relief, and what makes an appeal important enough that a court should issue what amounts to an advisory opinion despite being unable to grant such relief.

Moot Appeal, no Public-Interest Exception, in Eckersall v. Eckersall

In Eckersall v. Eckersall, 2015 IL 117922, the supreme court declined to apply the public-interest exception and dismissed the appeal as moot. Eckersall was a divorce case in which the wife appealed an interlocutory order that regulated the terms and conditions of her visitation with the couple’s minor children. The appellate court had dismissed the appeal for lack of jurisdiction, holding that the visitation order had not granted any “injunctive relief” and was therefore not appealable under Supreme Court Rule 307(a)(1). Eckersall, 2015 IL 117922, ¶ 6 (citing In re Marriage of Eckersall, 2014 IL App (1st) 132223, ¶ 31).

Shortly after the appellate court dismissed the appeal, however, the circuit court had entered an order finalizing the parties’ dissolution-of-marriage proceedings and superseding the interlocutory visitation order that was the subject of the appeal. The supreme court recognized that the final dissolution order prevented it from granting any relief from the visitation order, rendering the appeal moot. Id. ¶ 10. But while the parties agreed that the appeal was moot, the (by then former) wife urged the supreme court to resolve it anyway, arguing that even though it was moot, the public-interest exception to the mootness doctrine enabled the court to decide the case. Id. ¶ 11.

The supreme court examined the three criteria that must be met before a reviewing court may apply the exception: “(1) the question presented is of a substantial public nature; (2) there is a need for an authoritative determination for the future guidance of public officers; and (3) there is a likelihood of future recurrence of the question.” Id. (citing Felzak v.
Hruby, 226 Ill. 2d 382, 393 (2007)). The court emphasized that the exception is “narrowly construed,” and requires a “clear showing” of each criterion. Id. (citing In re Adoption of Walgreen, 186 Ill. 2d 362, 365 (1999)).

The court found that none of the criteria were satisfied. The “substantial public nature” factor required a clear showing “that the issue is of ‘sufficient breadth, or has a significant effect on the public as a whole.’” Id. ¶ 15 (quoting Felzak, 226 Ill. 2d at 393). Though the wife described the “form” order at issue in the appeal as frequently used, the court found that such orders were only used in dissolution proceedings in Cook County and only when the parties could not agree on the terms and conditions of visitation. The appeal did not satisfy the first factor, the court held, because the order had “a limited application to a small group of people and [did] not significantly affect the public as a whole.” Id.

Nor was there clear evidence of any need for an authoritative guidance on the issue. While the court suggested that this second factor might have been satisfied by a showing of “conflicting precedents” or a split of authority requiring resolution, there appeared to be no such legal conflict. Id. ¶ 16. Similarly, the court found that the apparent absence of litigation on the subject also meant that there was no showing that it was likely to recur. Id.

With none of the criteria satisfied, the supreme court found no basis for applying the public-interest exception, and suggested that cases in this area are typically unsuited to the exception: “Issues that arise in dissolution of marriage proceedings tend to be very fact specific and do not have broad-reaching implications beyond the particular dissolution of marriage proceedings.” Id. ¶ 19. Concluding that it had “improvidently granted” the petition for leave to appeal, the court dismissed the appeal as moot. Id. ¶ 21. The court mentioned but did not address a different argument, made by amicus curiae the American Academy of Matrimonial Lawyers, that the public-interest exception allowed the court to decide whether the visitation order was appealable as an injunction. See id. ¶ 13.

**Appeal Moot, but Public-Interest Exception Applies, in Cordrey v. Prisoner Review Board**

In another recent case, the supreme court found that the public-interest exception to the mootness doctrine allowed it to address the merits of a prisoner’s mandamus action, even though the action had been rendered moot when he was released during the appeal. In Cordrey v. Prisoner Review Bd., 2014 IL 117155, ¶ 17, the petitioner was a prisoner who sought leave to file a complaint for mandamus in the supreme court pursuant to Supreme Court Rule 381. He had been paroled, but it was a requirement of his parole that he serve a period of mandatory supervised release at a suitable location. Because no suitable location was available to him, he was immediately deemed to be in violation of his parole, taken back into custody, and forced to serve his term of mandatory supervised release in prison. His mandamus complaint challenged this practice—which was common enough to be known colloquially as “violating at the door”—as an unconstitutional violation of his rights to due process and equal protection. Cordrey, 2014 IL 117155, ¶ 1.

By the time the supreme court ruled on his petition, he was no longer under mandatory supervised release and was no longer an inmate, so the court was unable to grant him the relief he requested. Id. ¶ 12. The petitioner, however, had anticipated this circumstance, and argued that the public-interest exception would enable the court to resolve the constitutionality of “violating at the door” despite his own release. Id. ¶ 13.

The court recalled that it had previously addressed another issue related to mandatory supervised release even after another prisoner’s release had rendered the issue moot as to that prisoner. Id. ¶ 15 (citing Holly v. Montes, 231 Ill. 2d 153, 158 (2008)). In the earlier case, the court had observed that because so many prisoners would be on mandatory supervised release at least once, there were a “vast number of felons potentially affected” by practices related to such
release. *Id.* (quoting *Holly*, 231 Ill. 2d at 158). The issue therefore had a substantial public nature and a likeliness of recurrence, satisfying the first and third criteria of the public-interest exception. *Id.* (quoting *Holly*, 231 Ill. 2d at 158). In the earlier case the court had also recognized the “substantial litigation” concerning the issue in Illinois and federal courts, satisfying the second prong. *Id.* 16 ¶ (citing *Holly*, 231 Ill. 2d at 158).

In *Cordrey*, the court cited a long list of cases challenging “violating at the door,” and reiterated that a large number of offenders might potentially be affected by that practice. *Id.* ¶ 17 (collecting cases). These factors, the court held, satisfied the public-interest exception to the mootness doctrine, and called for the court to address the merits of the petitioner’s argument. *Id.* In the end, the court denied his petition, however, concluding that he had failed to establish a clear right to *mandamus*. *Id.* ¶ 39-40.

**Appeal not Moot in Jackson-Hicks v. East St. Louis Board of Election Commissioners**

In a third recent case, the supreme court found that an appeal in an election case was not moot at all, despite the substantial administrative difficulties involved in the relief the appellant sought. *Jackson-Hicks v. East St. Louis Bd. of Election Comm’rs*, 2015 IL 118929. The dispute arose during the campaign for the 2015 mayoral election in East St. Louis, Illinois, when one candidate filed an objection to the incumbent’s nominating petitions, arguing that they did not contain enough valid signatures for his name to be placed on the ballot. *Jackson-Hicks*, 2015 IL 118929, ¶ 5. Both the Election Board and the circuit court overruled the challenger’s objections, and by the time the appellate court affirmed those decisions, less than two months remained before the election. *Id.* ¶ 9 (citing *Jackson-Hicks v. East St. Louis Bd. of Election Comm’rs*, 2015 IL App (5th) 150028).

The supreme court granted the challenger’s petition for leave to appeal on an expedited basis. In addition to defending himself on the merits, the incumbent contended that preparations for the impending election had made the appeal moot. *Id.* ¶ 12. The supreme court rejected his contention, stating the standard for mootness: “A case on appeal becomes moot where the issues presented in the trial court no longer exist because events subsequent to the filing of the appeal render it impossible for the reviewing court to grant the complaining party effectual relief.” *Id.* (citing *Cinkus v. Village of Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 207-08 (2008)).

Though the election was by then barely three weeks away, the court found that because it had not yet been held, the court was still able to grant “effectual relief.” It was possible, “theoretically at least,” for new ballots to be printed and any electronic voting machines to be reprogrammed—and even if it was too late to do so, election officials could be ordered to disregard any votes cast for an ineligible candidate, including any such votes on absentee ballots already cast. *Id.* ¶ 15 (citing *Delgado v. Bd. of Election Comm’rs*, 224 Ill. 2d 481, 489 (2007); *Bryant v. Bd. of Election Comm’rs*, 224 Ill. 2d 473, 480 (2007)). The court called it “unfortunate” that absentee ballots could have already been cast for the incumbent, “but absentee voting and difficulty in notifying voters of ballot changes are common and unavoidable consequences of the narrow time frame in which election contests must be prosecuted.” *Id.* ¶ 16. These circumstances were not enough to make the appeal moot, the court held, because if they were, “meaningful judicial oversight of the electoral process would be all but impossible, and we would be powerless to prevent the election of candidates who failed to meet the requirements of the law.” *Id.*

Indeed, despite recognizing the practical consequences of granting the relief the challenger sought so shortly before the election, the court went on to do just that. Agreeing that the incumbent’s nominating petitions were inadequate, it
ordered that his name be removed from the ballot and that any absentee ballots already cast for him be disregarded in determining the winner of the election. *Id.* ¶¶ 42-44.

In concluding that the appeal was not moot, the supreme court considered it significant that the election had not yet been held. In addition to observing that the incumbent’s name still could be removed from election materials and votes already cast for him could be disregarded, the court also noted that the difficulty of doing so was not enough “to foreclose further judicial review of a timely and procedurally proper election challenge which concludes before the election cycle has ended.” *Id.* ¶ 16 (emphasis added). It is likely that the court would have concluded otherwise if the election had already been held—though it might have gone on to consider whether the public-interest exception applied. See *Bettis*, 2014 IL 117050, ¶ 8 (“The conclusion of an election cycle generally renders an election contest moot.”).

**Conclusion**

Despite the supreme court’s stated aversion to reviewing cases merely to establish precedent, the public-interest exception reflects the importance of precedent in a common-law system of justice. Litigants or insurers often find themselves returning to court on the same legal issue in many different cases, and may have a compelling interest in establishing precedent on that issue; by contrast, depending on the case and the issue, they may wish to avoid establishing such precedent. It is worthwhile to be aware of such opportunities, and to be able to advise clients as to whether it is worth trying pursue an otherwise moot appeal to a conclusion on the merits—or trying to prevent an adversary from doing so.

**About the Author**

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