IN RE EMONI W. ET AL.*
(AC 32453)
(AC 32454)

Bishop, Lavine and Beach, Js.**

Argued January 19—officially released June 28, 2011

(Appeal from Superior Court, judicial district of New London, Juvenile Matters at Waterford, Mack, J. [orders of temporary custody]; Driscoll, J. [order on placement of children study; neglect judgments].)

Michael F. Miller, for the appellants (minor children

in AC 32453).

Don M. Hodgdon, for the appellant (respondent father in AC 32454).

Tammy Nguyen-O'Dowd, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, *Richard Blumenthal*, former attorney general, and *Susan T. Pearlman*, assistant attorney general, for the appellee (petitioner in both cases).

Sarah Healy Eagan filed a brief for the Center for Children's Advocacy, Inc., et al., as amici curiae.

Opinion

LAVINE, J. The respondent father (respondent) and his minor children (children),[1] Emoni W. and Marlon W., appeal from the judgments of the trial court finding that the requirements of the Interstate Compact on the Placement of Children (compact), General Statutes § 17a-175, apply to the placement of a child with an out-of-state, noncustodial parent. On appeal, the respondent and the children argue that the court erred in finding that, pursuant to § 17a-175,[2] it could not place the children with the respondent without an approved compact study from the commonwealth of Pennsylvania, the permanent residence of the respondent.[3] Because we conclude that the respondent's and children's claims are moot and do not fall under any exceptions to the mootness doctrine, we lack subject matter jurisdiction to address their claims on appeal.

The following facts and procedural history are relevant to these appeals. The petitioner, the commissioner of children and families, became involved with the children because on April 28 and May 19, 2010, their mother[4] failed to provide adequate supervision of them. On July 9, 2010, the mother was arrested and charged with four counts of risk of injury to a child, possession of crack cocaine with intent to sell, possession of marijuana with intent to sell, possession of a hallucinogenic with intent to sell and operating a drug factory. Also on July 9, 2010, the children were removed from the mother's home under a ninety-six hour hold pursuant to General Statutes § 17a-101g.

On July 12, 2010, the court granted the petitioner's ex parte motions for orders of temporary custody as to the children. On this date, the petitioner, for the first time, became aware of the respondent. The petitioner learned that the respondent was living in Pennsylvania and that he previously had been responsible for the children's care for extended periods of time during school holidays. The petitioner also became aware that the respondent wanted to have the children live with him after their mother had been arrested.

On July 16, 2010, a preliminary hearing was held concerning the petitioner's orders for temporary custody. At this hearing, the respondent argued that § 17a-175 did not apply to him as a noncustodial parent and requested that the court allow him to take custody of the children. The court did not rule in response to the respondent's request but, instead, scheduled oral argument on the issue of whether § 17a-175 applied to an out-of-state, noncustodial parent. On July 23, 2010, the court concluded that § 17a-175 does apply to the placement of children with out-of-state, noncustodial parents. The children and the respondent filed separate appeals from this decision on July 30 and August 5, 2010, respectively.[5]

At a hearing on September 16, 2010, the court reported that it received the results of the compact study, authorizing placement of the children with the respondent in Pennsylvania on the condition that the court order six months of protective supervision. On this same date, the court adjudicated the children neglected and granted joint legal custody of the children to the respondent and the mother with physical custody in the respondent. The court also ordered protective supervision for a period of six months with the respondent.[6] At the time of oral argument in this court, the children were living with the respondent.[7]

Before we may address the respondent's and children's claims that § 17a-175 does not apply to out-of-state, noncustodial parents, we must first address whether we are precluded from reviewing their claims because they are moot. The issue of mootness was not addressed by the parties in their initial briefs or at oral argument. We ordered, sua sponte, the parties to submit supplemental briefs addressing whether the claims were moot and, if so, whether review was still permissible under the "capable of repetition, yet evading review" exception to the mootness doctrine.

The parties all agree that the claims are moot; however, they also all contend that the claims ought to be reviewed because they are capable of repetition, yet evading review. See *Loisel* v. *Rowe*, 233 Conn. 370, 382-83, 660 A.2d 323 (1995). Notwithstanding the parties' common position, we must conduct our own independent analysis. "[A] subject matter jurisdictional defect may not be waived . . . [or jurisdiction] conferred by the parties, explicitly or implicitly. . . . [T]he question of subject matter jurisdiction is a question of law . . . and, once raised, either by a party or by the court itself, the question must be answered before the court may decide the case." (Internal quotation marks omitted.) *D'Auria* v. *Solomine*, 107 Conn. App. 711, 714–15, 947 A.2d 345 (2008).

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) Id., 714.

We agree with the parties that the respondent's and

children's claims are moot because the compact study, recommending placement of the children with the respondent, was completed and the court granted the respondent legal and physical custody of the minor children during the pendency of these appeals. Furthermore, as noted, the period of protective supervision ordered by the court as a result of the compact study expired on March 18, 2011. There is, therefore, no practical relief that we can provide to the respondent or the children. We recognize, however, that review of the claims is still possible if they meet the requirements of an exception to the mootness doctrine. The respondent and the children argue that their claims can be reviewed under the "capable of repetition, yet evading review" exception. We disagree.

"Our cases reveal that for an otherwise moot question to qualify for review under the 'capable of repetition, yet evading review' exception, it must meet three requirements. First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot." *Loisel* v. *Rowe*, supra, 233 Conn. 382–83.

"[A] party typically satisfies [the first] prong if there exists a 'functionally insurmountable time [constraint]' "; *Dutkiewicz* v. *Dutkiewicz*. 289 Conn. 362, 367, 957 A.2d 821 (2008); or "the challenged action had an intrinsically limited lifespan." *Loisel* v. *Rowe*, supra, 233 Conn. 383. In other words, "[t]his requirement is satisfied when there is a strong likelihood that the inherently limited duration of the action will cause a substantial majority of cases raising the same issue to become moot prior to final appellate resolution." *Burbank* v. *Board of Education*, 299 Conn. 833, 840, 11 A.3d 658 (2011).

We conclude that the first prong of *Loisel* is not satisfied because the challenged action here, the application of § 17a-175 to out-of-state, noncustodial parents, is not inherently limited in duration and will not cause a substantial majority of cases raising the same issue to become moot prior to final appellate resolution. An order requiring that a compact study must be completed before a child can be placed with an out-of-state, noncustodial parent has an indefinite lifespan every time the receiving state disapproves of the transfer. Compare *In re Fabian A.*, 106 Conn. App. 151, 155–56, 941 A.2d

411 (2008) (order extending delinquency commitment inherently limited because, by statute, extension can last no more than eighteen months).

The respondent and the children argue that the first prong of *Loisel* is satisfied because orders of temporary custody are, by their very nature, limited in duration. The respondent and the children mischaracterize the challenged action that we must review under the first prong of *Loisel*. Although the court granted the petitioner's ex parte motions for orders of temporary custody as to the children on July 12, 2010, that is not the challenged action before this court. We are being asked to address whether the court's conclusion that § 17a-175 applies to the placement of children with out-of-state, noncustodial parents was proper. As noted, we conclude that this order does not have an inherently limited lifespan.[8]

Furthermore, the petitioner claims that there is a strong likelihood that a substantial number of cases involving the application of § 17a-175 to the placement of a child with an out-of-state, noncustodial parent will evade review. In support of this conclusion, the petitioner relies on statistics compiled by the department of children and families' interstate compacts office. These statistics, however, do not support the petitioner's claim that the challenged action here satisfies the first prong of *Loisel*. As noted, the standard is that there must be a "strong likelihood that the inherently limited duration of the action will cause a substantial majority of cases raising the same issue to become *moot* prior to final appellate resolution." (Emphasis added.) *Burbank* v. *Board of Education*, supra, 299 Conn. 840. According to the statistics cited by the petitioner, the receiving state disapproves of the placement of a child with the noncustodial parent almost half of the time that a compact study is requested.[9] In these situations where placement is denied, any order by the court applying § 17a-175 to out-of-state, noncustodial parents will *not* become moot. It is in these situations that an actual controversy will still exist and our appellate courts will be in the position to provide actual relief.[10]

We acknowledge the importance of this issue to out-of-state, noncustodial parents and understand the desire of the parties to obtain a judicial ruling. We also understand that compact studies can delay the placement of a child with a biological parent. See V. Sankaran, "Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children," 25 Yale L. & Policy Rev. 63, 74 n.53 (2006) ("State Compact administrators report waiting an average of three to four months for the entire home study to be completed. . . . Others have observed that the [compact] approval process can take 'between six months and one year and at times has exceeded one year'." [Citation omitted.]). We are,

however, constrained not to reach out and decide a case when we have concluded we lack subject matter jurisdiction. To do so would be to issue an advisory opinion, which we cannot do.

The respondent's and children's claims do not satisfy the first prong of *Loisel*; they are not entitled to consideration of their appeals under the "capable of repetition, yet evading review" exception. The appeals, therefore, must be dismissed for lack of subject matter jurisdiction.

The appeals are dismissed.

In this opinion BEACH, J., concurred.

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79-3, the names of the parties involved in these appeals are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

* * This case originally was argued before a panel of this court consisting of Judges Harper, Lavine and Beach on January 19, 2011. After oral argument, Judge Bishop replaced Judge Harper on the panel. All parties agreed that oral argument before the revised panel was not needed.

[1] Children are parties to juvenile cases involving adjudications of neglect and the termination of parental rights. See Practice Book § 32a-1 et seq. Children also have independent standing to bring a direct appeal of a judgment terminating parental rights. See *In re Melody L.*, 290 Conn. 131, 156–57, 962 A.2d 81 (2009).

[2] General Statutes § 17a-175 provides in relevant part: "*Each child requiring placement shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care.* . . . No sending state shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein. . . . *Prior to sending, bringing or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state.* . . ." (Emphasis added.)

[3] The respondent further claims that § 17a-175 violates a biological parent's procedural and substantive due process rights under the federal and Connecticut constitutions. We do not reach the constitutional claims in light of our conclusion that subject matter jurisdiction is lacking.

[4] The mother of the minor children has not appealed. We therefore refer in this opinion to the respondent father as the respondent.

[5] Practice Book § 61-6 (c) provides: "To the extent provided by law, the defendant or the state may appeal from a ruling that is not a final judgment or from an interlocutory ruling deemed to be a final judgment." This judgment is akin to an order for temporary custody, which our Supreme Court previously has concluded is immediately appealable as a final judgment. See *Madigan* v. *Madigan*, 224 Conn. 749, 757, 620 A.2d 1276 (1993). In *Madigan*, the court was persuaded by the plaintiff's argument that "[a] lost opportunity to spend significant time with one's child cannot be replaced by a subsequent order of custody as part of an ultimate dissolution judgment," and "[t]o deny immediate relief to an aggrieved parent interferes with the parent's custodial right over a significant period in a manner that cannot be redressed by a later appeal." Id., 756. The court, therefore, concluded that "temporary custody orders are immediately appealable because an immediate appeal is the only reasonable method of ensuring that the important rights surrounding the parent-child relationship are adequately protected." Id., 757. The court's decision concerning the applicability of the compact raises similar concerns and is, therefore, immediately appealable as a final judgment.

[6] This protective order has not been appealed.

[7] In the supplemental brief submitted by the respondent, we were informed that the period of protective supervision ended on March 18, 2011.

[8] Although an appeal from the court's orders of temporary custody is not the issue in this case, we note that in *In re Forrest B.*, 109 Conn. App. 772, 953 A.2d 887 (2008), the respondent mother appealed from the judgments of the trial court sustaining orders of temporary custody as to her two minor children. Id., 773. Although she conceded that this issue was moot, the respondent argued that her claims could be reviewed under the "capable of repetition, yet evading review" exception to the mootness doctrine. Id., 775. The respondent, however, did not produce any evidence that orders of temporary custody are, by their very nature, of such a limited duration that there is a strong likelihood that they will become moot before appellate litigation can be concluded. This court concluded that "[i]n failing to establish that the substantial majority of temporary custody orders evades review, the respondent has foundered on the first required criterion of the exception," and, therefore rejected the respondent's claim that the capable of repetition, yet evading review exception applies to her appeal. Id., 776.

[9] In 2010, for example, there were 109 compact study requests and placement was denied in fifty-one of the cases.

[10] The petitioner argues that the statistics demonstrate that the minimum amount of time that passes before an appeal is ready for oral argument exceeds the time before a decision can be made for placement in over 70 percent of all study requests. We do not quarrel with this assessment, but it is only when these studies result in the receiving state approving of placement that the claim becomes moot before appellate review.