

In the Supreme Court of the State of Alaska

Office of Public Advocacy,)
)
 Appellant,)
 v.)
)
 Alaska Court System, Randall Guy)
 Gordanier, Jr., and Siv Betti Jonsson,)
)
 Appellees.)

Supreme Court No. S-12999

Order

Date of Order: 5/29/09

Trial Court Case # 3AN-06-08887CI

Before: Fabe, Chief Justice, and Eastaugh, Carpeneti, Winfree, and Christen, Justices

This court has considered the parties' briefs and the amicus briefs and the record on appeal. It appears that on 1/15/08 the superior court entered the decree of child custody and the findings of fact and conclusions of law awarding child custody in the underlying custody dispute in this case. It also appears that, regardless of whether it was error to require OPA to pay for appointed counsel, that expense has been or ultimately will be paid by the State of Alaska. Considering that the current fiscal year ends June 30, 2009, it seems improbable that any discussion by this court about who should pay will have any actual effect as to this particular dispute. It also appears that the appointment of counsel in this case was fact-specific. Finally, it appears that the broader due process issue — whether due process requires appointment of counsel at state expense for an indigent parent in a child custody proceeding when the other parent is represented by privately retained counsel — is not properly before this court, no cross-appeal having been filed. Therefore,

IT IS ORDERED:

1. The parties are asked to address, in simultaneous opening memos and simultaneous responses, why this appeal should not be dismissed, for these reasons:
 - (a) the equal protection and statutory issues are mooted by the conclusion of the initial custody dispute in which counsel was appointed, and
 - (b) the due process issue is not properly before this court.

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2. We recognize that the issues are of public importance and are likely to recur. But an opinion on an issue mooted by performance would be advisory.¹ And because the State of Alaska did not cross-appeal or directly challenge the due process ruling, anything this court could say in this case about the due process issue may be advisory.² An opinion on an issue that was not preserved would be advisory.³ The court regards the due process issue raised in this case as too important to resolve unless there is a real case in controversy.⁴

3. The opening memos are due on or before 6/18/09 and must be personally served. The responses are due 6/29/09. The opening memos and responses are each limited to ten pages. Amici may file memos and responses not exceeding five pages. Among other things, the court is interested in being informed whether it is probable any party in a future case raising similar issues will squarely argue and preserve a contention that due process does not require appointment of counsel for an indigent parent in a custody case whenever the other parent has privately retained counsel.

¹ See *Hayes v. Charney*, 693 P.2d 831, 834 (Alaska 1985) (holding, in case in which individual legislators challenged award of contract by legislative council for television coverage of activities of legislature, that case was moot because “the 1983 legislative session [was] over, and the contract in question ha[d] been fully performed by both parties” and any opinion would therefore be “advisory only”).

² We have held that “[a]dvisory opinions are to be avoided.” *Earth Movers of Fairbanks, Inc. v. State, Dep’t of Transp. & Pub. Facilities*, 824 P.2d 715, 718 (Alaska 1992) (internal quotations omitted) (citing *Gieffels v. State*, 552 P.2d 661, 664-65 (Alaska 1976), *disapproved on other grounds*, *Miller v. State*, 617 P.2d 516 (Alaska 1980)).

³ The public interest exception to the mootness doctrine requires that the potentially moot case “raise[] a matter” that meets the three public interest exception factors. *Bigley v. Alaska Psychiatric Inst.*, __ P.3d __, Op. No. 6374 at 17, 2009 WL 1424454 at *9 (Alaska, May 22, 2009). If the due process issue has not been properly raised in this appeal the case arguably does not “raise [the] matter.”

⁴ We have also held that cases that are not actual cases or controversies “are not properly considered.” *Gieffels*, 552 P.2d at 664-65 (citing *Munroe v. City Council for City of Anchorage*, 545 P.2d 165, 169-70 (Alaska), *modified on reh’g*, 547 P.2d 839 (Alaska 1976); *In re G.M.B.*, 483 P.2d 1006, 1008 (Alaska 1971)).

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Entered at the direction of the court.

Clerk of the Appellate Courts



Claire Bruns, Deputy Clerk

cc: Supreme Court Justices
Judge Rindner

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