# Tab 2

**Rule 47. Reviews and modification of orders.**

(a) Reviews.

(a)(1) At the time of disposition in any case wherein a minor is placed on probation, under protective supervision or in the legal custody of an individual or agency, the court shall also order that the individual supervising the minor or the placement, submit a written report to the court at a future date and appear personally, if directed by the court, for the purpose of a court review of the case. If a date certain is not scheduled at the time of disposition, notice by mail of such review shall be given by the petitioner, if the review is a mandatory review, or by the party requesting the review to the supervising agency not less than 5 days prior to the review. Such notice shall also be given to the guardian ad litem, if one was appointed.

= paper review

(a)(2) No modification of a prior dispositional order shall be made at a report review that would have the effect of further restricting the rights of the parent, guardian, custodian or minor, unless the affected parent, guardian custodian or minor waives the right to a hearing and stipulates in open court or in writing to the modification. If a guardian ad litem is representing the minor, the court shall give a copy of the report to the guardian prior to the report review.

(b) Review hearings.

(b)(1) Any party in a case subject to review may request a review hearing. The request must be in writing and the request shall set forth the facts believed by the requesting party to warrant a review by the court. If the court determines that the alleged facts, if true, would justify a modification of the dispositional order, a review hearing shall be scheduled with notice, including a copy of the request, to all other parties. The court may schedule a review hearing on its own motion.

(b)(2) The court may modify a prior dispositional order in a review hearing upon the stipulation of all parties and upon a finding by the court that such modification would not be contrary to the best interest of the minor and the public.

(b)(3) The court shall not modify a prior order in a review hearing that would further restrict the rights of the parent, guardian, custodian or minor if the modification is objected to by any party prior to or in the review hearing. The court shall schedule the case for an evidentiary hearing and require that a motion for modification be filed with notice to all parties in accordance with Section 78A-6-1103.

(b)(4) All cases which require periodic review hearings under Title 78A Chapter 6 shall be scheduled for court review not less than once every six months from the date of disposition.

(c) Disposition reviews. Upon the petition of any agency, individual or institution vested with legal custody or guardianship by prior court order, the court shall conduct a review hearing to determine if the prior order should remain in effect. Notice of the hearing, along with a copy of the petition, must be provided to all parties not less than 5 days prior to the hearing.

(d) Review of a case involving abuse, neglect, or dependency of a minor shall be conducted also in accordance with Section 78A-6-117, Section 78A-6-314 and Section 78A-6-315.

(e) Intervention plans.

(e)(1) In all cases where the disposition order places temporary legal custody or guardianship of the minor with an individual, agency, or institution, a proposed intervention plan shall be submitted by the probation department when probation has been ordered; by the agency having custody or

guardianship; or by the agency providing protective supervision, within 30 days following the date of disposition. This intervention plan shall be updated whenever a substantial change in conditions or circumstances arises.

(e)(2) In cases where both parents have been permanently deprived of parental rights, the intervention plan shall identify efforts made by the child placing agency to secure the adoption of the minor and subsequent review hearings shall be held until the minor has been adopted or permanently placed.

(f) Progress reports.

(f)(1) A written progress report relating to the intervention plan shall be submitted to the court and all parties by the agency, which prepared the intervention plan at least two working days prior to the review hearing date.

(f)(2) The progress report shall contain the following:

(f)(2)(i) A review of the original conditions, which invoked the court's jurisdiction.

(f)(2)(ii) Any significant changes in these conditions.

(f)(2)(iii) The number and types of contacts made with each family member or other person related to the case.

(f)(2)(iv) A statement of progress toward resolving the problems identified in the intervention plan.

(f)(2)(v) A report on the family's cooperation in resolving the problems.

(f)(2)(vi) A recommendation for further order by the court.

(g) In substantiation proceedings, a party may file a motion to set aside a default judgment or dismissal of a substantiation petition for failure to appear, within thirty days after the entry of the default judgment or dismissal. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party from a default judgment or dismissal if the court finds good cause for the party's failure to appear. The filing of a motion under this Subdivision does not affect the finality of a judgment or suspend its operation.

# THE UTAH COURT OF APPEALS

STATE OF UTAH, IN THE INTEREST OF P.D., A PERSON UNDER EIGHTEEN YEARS OF AGE.

E.D.,
Appellant,
*v.*
STATE OF UTAH,
Appellee.

Opinion
No. 20120227-CA
Filed June 27, 2013

Third District Juvenile, Summit Department
The Honorable Mark W. May
No. 1046790

Gail E. Laser, Attorney for Appellant
John E. Swallow and John M. Peterson, Attorneys
for Appellee
Martha Pierce, Attorney for Guardian Ad Litem

JUDGE GREGORY K. ORME authored this Opinion, in which JUDGES JAMES Z. DAVIS and WILLIAM A. THORNE JR. concurred.

ORME, Judge:

¶1 Appellant E.D. (Father) appeals an order from the juvenile court that awarded full custody and guardianship of their son to Mother. Father argues that he was improperly denied an evidentiary hearing as required by rule 47 of the Utah Rules of Juvenile Procedure. We agree with Father, but we decline to reverse because Father has failed to meet his burden to show that the error was harmful.

## BACKGROUND

¶2 Following their divorce in 2008, Father and Mother shared custody of their son, P.D. In January 2011, allegations of abuse were brought against Father, and an ex parte petition for a protective order was filed. The juvenile court entered a protective order, and Mother was temporarily given full physical custody. Following an investigation, no prosecution was initiated by police and the Division of Child and Family Services (DCFS) substantiated only some of the allegations. In August 2011, however, Father entered a plea under rule 34(e) of the Utah Rules of Juvenile Procedure by which he "declin[ed] to admit or deny the allegations." *See* Utah R. Juv. P. 34(e). When a plea is entered under rule 34(e), "[a]llegations not specifically denied by a respondent shall be deemed true," *id.*, and Father was made aware that by entering a rule 34(e) plea he was waiving his right to a trial on those allegations.

¶3 The allegations to which Father entered a rule 34(e) plea included spanking P.D.'s bare buttocks, requiring P.D. to sleep with him while Father slept in the nude, requiring P.D. to touch Father's genitals while Father watched pornographic material, calling P.D. names like "jerk off" and "asshole," and grabbing P.D. by the neck and holding him against a wall until P.D. urinated. In early September, the juvenile court adjudicated Father to have abused P.D., and, while the previously entered protective order was dismissed, the grant of physical custody to Mother as well as restrictions on Father's visitation time were continued in effect. A November order ratified this arrangement.

¶4 The next hearing was held in February 2012. The juvenile court permitted portions of a report from P.D.'s Court-Appointed Special Advocate (CASA volunteer) to be read aloud. The report stated that P.D. "just wants to move forward in his life and not be forced to see his father so frequently." The report also indicated that P.D. felt uncomfortable around his father and that the CASA volunteer believed "the Court should not force this relationship

until the father gets some psychological help." The court reviewed the summary of a psychosexual evaluation, which had only recently been completed by Father, that concluded that Father continued to deny the occurrence of any abuse. The court then indicated that it would grant full custody of P.D. to Mother. Previous orders for family therapy were vacated, and Father was allowed one hour per week of supervised visitation. Future contact between Father and P.D. was to be determined by P.D.'s therapist. The court requested Mother's attorney to prepare an order implementing these dispositions. Upon hearing this, Father's counsel requested an evidentiary hearing under rule 47 of the Utah Rules of Juvenile Procedure. The court denied the motion saying, "I don't believe you're entitled to that."

## ISSUE AND STANDARD OF REVIEW

¶5 Father appeals the juvenile court's denial of the requested evidentiary hearing, insisting that he was entitled to one by the express terms of rule 47 of the Utah Rules of Juvenile Procedure. "[T]his court generally reviews interpretations of rules for correctness." *In re Fox*, 2004 UT 20, ¶ 5, 89 P.3d 127.

## ANALYSIS

¶6 Rule 47 of the Utah Rules of Juvenile Procedure provides:

> The court shall not modify a prior order in a review hearing that would further restrict the rights of the parent, guardian, custodian or minor if the modification is objected to by any party prior to *or in* the review hearing. The court shall schedule the case for an evidentiary hearing and require that a motion for modification be filed with notice to all parties in accordance with Section 78A-6-1103.

Utah R. Juv. P. 47(b)(3) (emphasis added). Father characterizes as timely the objection he made *in*, albeit at the end of, the review hearing where custody of his son was permanently granted to Mother.[1] He argues that he was therefore entitled to the benefit of an evidentiary hearing before any modification was made to P.D.'s custody arrangements. The Guardian Ad Litem argues that rule 47 does not apply to this hearing because Father's rights were not further restricted as a result of the hearing. The State argues that failure to grant such a hearing was harmless error. We review each of these arguments in turn.

I. Father's Objection Was Timely.

¶7 Father argues that the juvenile court erred in denying his request for an evidentiary hearing because his objection was timely given the language of rule 47. Under the rule, an evidentiary hearing must be granted if objection is made "prior to or in the review hearing." Utah R. Juv. P. 47(b)(3). Rule 47, however, does not provide any specific guidance as to when a party would have to make an objection in order for it to qualify as having been made "in the review hearing." *Id.* "We interpret court rules, like statutes and administrative rules, according to their plain language." *Burns v. Boyden*, 2006 UT 14, ¶ 19, 133 P.3d 370. Because the plain

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[1]The State argues that this was not a "review hearing" but was instead a "final dispositional review" and that rule 47 does not apply in this case. Whether this was a review hearing, as argued by Father, or a final dispositional review, as argued by the State, we see no language in the rule leading us to believe that the requirement in rule 47(b)(3) would not be applicable in either situation. In other words, even if this had been a dispositional hearing governed by rule 47(c) as the State suggests, we see no language exempting it from rule 47(b)(3)'s mandate to grant an evidentiary hearing upon demand. If anything, this mandate is even more important in a dispositional review hearing than in a routine review hearing.

language of the rule permits the objection to be made "in" the review hearing, it rather clearly allows the objection to be made at any time before the hearing ends. Thus, Father's objection was timely.

¶8 That said, we concede that it is quite odd that a party could wait as long as Father did here and still be allowed to interpose his objection and trigger his entitlement to an evidentiary hearing. Essentially, Father was permitted to participate in a non-evidentiary hearing, see which way the wind was blowing, and then make his request at the eleventh hour—indeed, after the juvenile judge had already directed Mother's attorney to prepare the implementing order, just prior to adjourning the hearing. This is not a format that enhances orderly process, and it may well be that the rule is in need of revision. Nevertheless, we must conclude that Father's objection was made "in the review hearing" and that he was therefore entitled to the requested evidentiary hearing.

II. Father's Rights Were Modified.

¶9 The Guardian Ad Litem argues that rule 47 should not apply because Father's rights were not further restricted or substantially changed at the hearing in question. Rule 47 mandates an evidentiary hearing only in cases where the rights of a party are "further restrict[ed]." Utah R. Juv. P. 47(b)(3). The Guardian contends that P.D. was already in Mother's full custody per the November 2011 order and so the only substantive changes made to Father's rights were that he was granted one hour of supervised visitation and that an order for family therapy was vacated. The Guardian goes so far as to argue that Father's rights were actually broadened as a result of the hearing because of the grant of additional visitation. We disagree.

¶10 While the practical effect of the February 2012 order was merely to continue the custody arrangement ordered in November 2011, Father's rights were still significantly restricted when compared with the permanent custody order included in the

couple's divorce decree. Indeed, the divorce decree appears to be the order that the juvenile court was referring to when it stated, "The prior order that [Father] and [Mother] have joint legal custody of [P.D.] is vacated. Full custody and guardianship of [P.D.] is awarded to [Mother]." Moreover, while the February 2012 order did not tinker much with the quantum of custody and visitation that had been decreed in the November 2011 order, the new order moved the disposition from temporary to permanent—a momentous change in Father's view. Father's rights had been in a state of flux following the allegations of abuse and petition for a protective order. We determine that the modification made at the February 2012 hearing was a change that, if for no other reason than it moved the custody arrangement from being temporary to permanent, "further restrict[ed]" Father's parental rights. *See id.* Therefore, we conclude that rule 47 does apply.

## III. The Juvenile Court's Failure To Grant An Evidentiary Hearing Was Harmless.

¶11 While the State argues that the failure to grant an evidentiary hearing was harmless, Father argues that a juvenile court's failure to grant an evidentiary hearing "can never constitute harmless error" because it implicates the due process rights of parents. This conclusory statement ignores Father's burden to show that the error committed by the juvenile court ultimately impacted the outcome of the proceedings. "On appeal, the appellant has the burden of demonstrating an error was prejudicial—that there is a reasonable likelihood that the error affected the outcome of the proceedings." *Steffensen v. Smith's Mgmt. Corp.*, 820 P.2d 482, 489 (Utah Ct. App. 1991) (citation and internal quotation marks omitted).

¶12 Father has failed to meet his burden to show that had an evidentiary hearing been granted, "'the likelihood of a different outcome [would have been] sufficiently high as to undermine our confidence in the [judgment].'" *Covey v. Covey*, 2003 UT App 380, ¶ 21, 80 P.3d 553 (quoting *Crookston v. Fire Ins. Exch.*, 817 P.2d 789,

796 (Utah 1991)). Mother was given full custody, on a temporary basis, after the allegations of sexual and other abuse were made against Father. These allegations were later deemed by the court to be true after Father entered a plea under rule 34(e). As the juvenile court pointed out, "There's a court finding in place he sexually abused his son. And so I take that and determine . . . what I need to do, given this information." While the juvenile court expressed concern that Father had not fully understood the consequences of a rule 34(e) plea, the court also made it clear that the consequences were fully explained to and acknowledged by Father before the plea was entered. The findings of sexual abuse against Father have not been vacated or modified, and Father has failed to demonstrate how an evidentiary hearing would have elicited evidence that would convince the court that requiring P.D. to spend more time with an adjudicated sex offender—an adjudicated sex offender who had abused *him*—was in the child's best interest.

¶13 Instead of demonstrating how an evidentiary hearing would have benefitted him, or attempting to explain to this court what additional evidence or testimony he would have provided at the hearing that might have altered the juvenile court's custody determination,[2] Father instead primarily argues that he was

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[2]Father did not proffer, nor even ask to proffer, the evidence he expected to adduce at the evidentiary hearing. Absent such a proffer, a harmless error conclusion is almost automatic. *See, e.g., State v. Frame*, 723 P.2d 401, 406 (Utah 1986) (holding defendant could not show that counsel's failure to call certain witnesses was prejudicial when defendant did "not identify what other persons should have been called as witnesses or how their testimony was essential to his defense"); *Black v. Hennig*, 2012 UT App 259, ¶ 16, 286 P.3d 1256 (holding "no appellate relief is available" to a party who fails to proffer the contents of improperly excluded evidence, and that such failure to proffer "prevents [the court] from undertaking a

(continued...)

necessarily harmed simply because the error occurred. Father does point to his efforts to cooperate with court orders, including enduring a psychosexual evaluation and attending parenting classes, the success of visitation with P.D., and a positive report from another therapist as evidence that the juvenile court had another choice besides granting full custody to Mother. However, Father fails to explain how this information demonstrates that the error of denying an evidentiary hearing was harmful or how the introduction of these facts at such a hearing would have changed the ultimate custody arrangement. After all, this information was already before the juvenile court when it made the determination to permanently grant Mother full custody of P.D.

## CONCLUSION

¶14 We determine that the plain language of rule 47 of the Utah Rules of Juvenile Procedure entitled Father to an evidentiary hearing. However, because Father has failed to meet his burden to demonstrate how this error ultimately impacted the juvenile court's custody determination, we affirm.

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[2](...continued)
meaningful harmless error analysis"). *See also Downey State Bank v. Major-Blakeney Corp.*, 578 P.2d 1286, 1288 (Utah 1978) (holding that "failure to make a proffer as to what his evidence would show precludes him from asserting on appeal that the exclusion was error"), *overruled on other grounds by Management Servs. Corp. v. Development Assocs.*, 617 P.2d 406, 409 (Utah 1980).

# Tab 3

**78A-6-114. Hearings -- Public excluded, exceptions -- Victims admitted -- Minor's cases heard separately from adult cases -- Minor or parents or custodian heard separately -- Continuance of hearing -- Consolidation of proceedings involving more than one minor.**

(1) Hearings in minor's cases shall be held before the court without a jury and may be conducted in an informal manner.

(a) (i) In abuse, neglect, and dependency cases the court shall admit any person to a hearing, including a hearing under Section 78A-6-322, unless the court makes a finding upon the record that the person's presence at the hearing would:

(A) be detrimental to the best interest of a child who is a party to the proceeding;

(B) impair the fact-finding process; or

(C) be otherwise contrary to the interests of justice.

(ii) The court may exclude a person from a hearing under Subsection (1)(a)(i) on its own motion or by motion of a party to the proceeding.

(b) In delinquency cases the court shall admit all persons who have a direct interest in the case and may admit persons requested by the parent or legal guardian to be present. The court shall exclude all other persons except as provided in Subsection (1)(c).

(c) In delinquency cases in which the minor charged is 14 years of age or older, the court shall admit any person unless the hearing is closed by the court upon findings on the record for good cause if:

(i) the minor has been charged with an offense which would be a felony if committed by an adult; or

(ii) the minor is charged with an offense that would be a class A or B misdemeanor if committed by an adult, and the minor has been previously charged with an offense which would be a misdemeanor or felony if committed by an adult.

(d) The victim of any act charged in a petition or information involving an offense committed by a minor which if committed by an adult would be a felony or a class A or class B misdemeanor shall, upon request, be afforded all rights afforded victims in Title 77, Chapter 36, Cohabitant Abuse Procedures Act, Title 77, Chapter 37, Victims' Rights, and Title 77, Chapter 38, Rights of Crime Victims Act. The notice provisions in Section 77-38-3 do not apply to important juvenile justice hearings as defined in Section 77-38-2.

(e) A victim, upon request to appropriate juvenile court personnel, shall have the right to inspect and duplicate juvenile court legal records that have not been expunged concerning:

(i) the scheduling of any court hearings on the petition;

(ii) any findings made by the court; and

(iii) any sentence or decree imposed by the court.

(2) Minor's cases shall be heard separately from adult cases. The minor or the parents or custodian of a minor may be heard separately when considered necessary by the court. The hearing may be continued from time to time to a date specified by court order.

(3) When more than one child is involved in a home situation which may be found to constitute neglect or dependency, or when more than one minor is alleged to be involved in the same law violation, the proceedings may be consolidated, except that

separate hearings may be held with respect to disposition.

Renumbered and Amended by Chapter 3, 2008 General Session

Utah State Courts

Katie Gregory <katieg@utcourts.gov>

# URJP issues

1 message

**Carol Verdoia** <cverdoia@utah.gov> Mon, Jul 15, 2013 at 3:48 PM
To: Katie Gregory <katieg@utcourts.gov>

Hi Katie -

A decision came out on June 20th in the Court of Appeals that suggested one of our rules may need to be clarified. The case is listed as *In re P.D.*, 2013 UT App 151. You can find it on the Court's website, the Appellate Court link, under the Court of Appeals' Juvenile decisions. I think we should put it on the agenda for our next meeting.

Also, did you ever talk to Tim about SB 7 whether it is applicable to our committee? I may be missing something but it does define "State public body" as an advisory body. Just curious about whether we were required to comply with that.

Thanks,
Carol

Utah State Courts

Katie Gregory <katieg@utcourts.gov>

# URJP

1 message

**Alison Adams-Perlac** <alisonap@utcourts.gov> Tue, Jun 4, 2013 at 1:39 PM
To: Katie Gregory <katieg@utcourts.gov>

Hi Katie,

I have a potential topic for our next URJP meeting.

URJP 50 is inconsistent with Utah Code section 78A-6-114, at least with regard to who may have access to abuse, neglect, and dependency proceedings.

It appears that the rule may not have been updated after the statute was updated a few years back.

Thank you,

–
Alison Adams-Perlac, J.D.
Juvenile Court Law Clerk
Administrative Office of the Courts
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P.O. Box 140241
Salt Lake City, Utah 84114-0241
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IN THE UTAH COURT OF APPEALS

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| | | |
|---|---|---|
| Sean Barnett, | ) | AMENDED OPINION[1] |
| | ) | |
| Petitioner and Appellee, | ) | Case No. 20100562-CA |
| | ) | |
| v. | ) | FILED |
| | ) | (January 6, 2012 ) |
| Polly Adams, | ) | |
| | ) | 2012 UT App 6 |
| Respondent and Appellant. | ) | |

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Third District Juvenile, Salt Lake Department, 1036546
The Honorable Andrew A. Valdez

Attorneys: Mary Rutledge, Payson, for Appellant
Ezekiel R. Dumke IV, Salt Lake City, for Appellee
Martha Pierce, Salt Lake City, Guardian ad Litem

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Before Judges Davis, McHugh, and Thorne.

DAVIS, Presiding Judge:

¶1 Polly Adams (Mother) appeals the juvenile court's grant of Sean Barnett's (Father) child protective order petition. We dismiss the appeal because the issues are moot.

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1. This Amended Opinion replaces the Opinion in Case No. 20100562-CA issued on December 1, 2011.

## BACKGROUND

¶2 Mother and Father are the parents of J.B. (Child). The two parents were never married to each other. Mother was awarded primary custody of Child in a paternity case in 2004. Father filed a child protective order petition in the juvenile court on May 26, 2010, based upon Child's statements to both Father and Child's school principal that Mother beat him the previous night and "had been hitting him for a long time." The juvenile court granted an ex parte protective order, which gave Father temporary custody of Child, and set a hearing on the petition for June 10, 2010. *See generally* Utah Code Ann. § 78B-7-203(1) (Supp. 2011) ("If an ex parte order is granted, the court shall schedule a hearing within 20 days after the ex parte determination."). Throughout the June 10 hearing, the juvenile court posed questions to each party's counsel and at times interrupted counsel as they answered. For instance, Mother's objections were often interrupted before her counsel could articulate the reasons behind the objection. Her objections were primarily on hearsay grounds, arguing that the statements in Father's protective order petition, the guardian ad litem's (GAL) statements pertaining to her interview with Child, and the report created by the Division of Child and Family Services (DCFS) constituted inadmissible hearsay. Toward the end of the proceeding, Mother's counsel repeated these objections, stating, "[T]here is no testimony other than . . . hearsay . . . ." The juvenile court summarily overruled the objections, agreeing with the GAL that the hearing was "dispositional in nature and the rules of juvenile procedure permit hearsay testimony [in dispositional proceedings]." The juvenile court found that Child was "in imminent danger of abuse" and concluded that it was "not safe [for him] to return home without instituting some form of protective supervision services or a safety plan." The juvenile court granted Father's petition in a Final Protective Order against Mother (the protective order). The protective order provided that Child be "placed in the temporary custody of [Father]," authorized supervised visitation for Mother, and ordered DCFS "to provide protective supervision services to the child" and "to establish a safety plan [for Mother and Father to] follow."[2] The protective order was to expire "150 days from the date of the order," or on or around November 10, 2010. Mother filed an appeal from the protective order on July 8, 2010.

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[2]The protective order also ordered the parties to participate in family counseling.

## ISSUE AND STANDARD OF REVIEW

¶3 Mother appeals the protective order, arguing that the evidence supporting it consisted entirely of hearsay statements that the juvenile court erred in admitting, that the protective order was against the clear weight of the admissible evidence, and that Mother's due process rights were violated because the juvenile court assumed Father's burden of proof by actively questioning the witnesses.

¶4 Before addressing Mother's arguments, however, we must be satisfied that the issues raised are not moot or that an exception to the mootness doctrine applies.[3] A case is deemed moot "[i]f the requested judicial relief cannot affect the rights of the litigants." *H.U.F. v. W.P.W.*, 2009 UT 10, ¶ 21, 203 P.3d 943 (alteration in original) (internal quotation marks omitted). "Because mootness is a matter of judicial policy, the ultimate determination of whether to address an issue that is technically moot rests in the discretion of this court." *In re C.D.*, 2010 UT 66, ¶ 13, 245 P.3d 724 (internal quotation marks omitted). In addition,

> [t]he function of appellate courts, like that of courts generally, is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation, and it has been held that questions or cases which have become moot or academic are not a proper subject to review.

*McRae v. Jackson*, 526 P.2d 1190, 1191 (Utah 1974) (internal quotation marks omitted).

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[3]The GAL argues that the protective order does not constitute a final, appealable order because it has been consolidated with a paternity modification proceeding that is pending, and has possibly been completed, in the district court. Because another panel of this court denied the GAL's motion to supplement the record, the record presented on appeal does not contain any information for us to verify this assertion—not even an order from the juvenile court transferring the case to the district court or a case number to confirm that there is in fact an active proceeding in the district court dealing with issues relevant to this appeal. Accordingly, we do not address the GAL's finality argument.

## ANALYSIS

¶5 Here, the protective order against Mother "presumably expired by its own terms," *Burkett v. Schwendiman*, 773 P.2d 42, 44 (Utah 1989) (mem.), on or around November 10, 2010, and there is no information in the record to indicate it was continued in effect. Consequently, reversal of the juvenile court's grant of the protective order cannot affect Mother's rights because the protective order, and the orders and conditions contained therein, should have expired roughly one year ago. Thus, the issues presented on appeal are moot.

### I. Collateral Consequences Exception to Mootness

¶6 Mother argues that we should nonetheless review her mooted claims because the doctrine of collateral consequences applies.[4] We disagree.

¶7 "Where collateral legal consequences may result from an adverse decision, courts have generally held an issue not moot and rendered a decision on the merits." *In re Giles*, 657 P.2d 285, 286 (Utah 1982) (citing *Carafas v. LaVallee*, 391 U.S. 234 (1968)); *see also Putman v. Kennedy*, 900 A.2d 1256, 1261 (Conn. 2006) ("[T]he court may retain jurisdiction when a litigant shows that there is a reasonable possibility that prejudicial collateral consequences will occur . . . ." (omission in original) (internal quotation marks omitted)). This exception to mootness is generally applied in criminal cases. *See In re Giles*, 657 P.2d at 286 ("The doctrine of collateral legal consequences is chiefly applied in criminal cases where the absence or presence of those consequences may determine a criminal's chance of rehabilitation or recidivism." (citing *Sibron v. New York*, 392 U.S. 40 (1968))); *see also Sibron*, 392 U.S. at 57 ("[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."); *Gardiner v. York*, 2010 UT App 108, ¶ 33, 233 P.3d 500 (same), *cert. denied*, 238 P.3d 443 (Utah 2010). Accordingly, the examples of collateral consequences that preclude a case from mootness are relatively limited. *See, e.g., In re Giles*, 657 P.2d at 286-87 (applying the collateral consequences exception "to patients of mental hospitals who face . . . deprivations of liberty [similar to prisoners] and whose commitment and hospitalization must stand scrutiny on the merits when

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[4]We denied the GAL's first motion to dismiss Mother's appeal on mootness grounds and requested that the parties brief, "along with all other relevant issues, . . . the mootness argument raised by the [GAL] and the issue of whether any potential collateral consequences preclude dismissal on mootness grounds."

challenged"); *Duran v. Morris*, 635 P.2d 43, 45 (Utah 1981) (listing possible collateral consequences in the criminal law context).

¶8 However, one commonality among the applications of the collateral consequences doctrine is the need for the consequences complained of to be more than merely speculative. *See, e.g., Spencer v. Kemna*, 523 U.S. 1, 14 (1998) (holding that "a possibility rather than a certainty or even a probability" of suffering a collateral consequence is insufficient to overcome mootness); *Fratis v. Ortiz*, 190 F. App'x 686, 688 (10th Cir. 2006) (applying *Spencer*, 523 U.S. at 14, and holding that collateral consequences must be shown, not presumed); *State v. Moore*, 2009 UT App 128, ¶ 17, 210 P.3d 967 (explaining that collateral consequences "will not [be] presume[d]" when a party has failed to show that the consequences complained of are "actual[ and] adverse"). Thus, a litigant must show that the collateral consequences complained of are not merely hypothetical or possible but that they are probable and represent actual and adverse consequences. *See Spencer*, 523 U.S. at 14; *Moore*, 2009 UT App 128, ¶ 17; *cf. Putman*, 900 A.2d at 1261-62 (noting that Connecticut recognizes a diverse array of collateral consequences, "includ[ing] harm to a defendant's reputation as a result of the judgment at issue," and that a "litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur . . . by more than mere conjecture, but need not demonstrate that these consequences are more probable than not").

¶9 Assuming without deciding that the collateral consequences doctrine ought to apply in this civil context, Mother's alleged collateral consequences are merely speculative. Specifically, Mother argues that "the juvenile court's erroneous adjudication of child abuse" in the protective order prompted Father to file a petition to modify the Order of Paternity, which resulted in Mother losing primary physical custody of Child. Additionally, Mother asserts that as a result of this adjudication of abuse she "is now listed on the management information system [MIS], which listing legally impairs her right to foster a child, adopt a child, or work with children."[5]

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[5]Utah Code section 62A-4a-1003 requires DCFS to maintain a management information system that contains information regarding the complete history of each child involved in a child welfare case. *See* Utah Code Ann. § 62A-4a-1003(2) (2011). Among other things, a child welfare case history filed in the MIS should include "a record of all reports of abuse or neglect received by the division with regard to that child's parent[ or] parents" and indicate the status and findings of those reports. *Id.* § 62A-4a-1003(2)(e). This case history is "exclusively for the purposes of foster parent

(continued...)

Mother, however, does not claim that she has attempted or even plans to exercise "her right to foster a child, adopt a child, or work with children" or that being listed in the MIS actually impaired her ability to pursue any of these things.[6] She has simply listed potential legal impairments that generally impact a person listed in the MIS, not injuries that she has actually suffered or will even likely suffer based on a pending application to foster, adopt, or work with children, or even based on any expressed intent by Mother to pursue a foster placement, adoption, or occupation with children.[7] Thus, assuming that the collateral consequences doctrine ought to apply in this instance, "the hypothetical impact" of Mother's listing in the MIS "does not create a collateral legal

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[5](...continued)
licensure and monitoring." *Id.* § 62A-4a-1003(2). Additionally, "[w]ith regard to all child protective services cases, the [MIS] shall: (a) monitor the compliance of each case with . . . [DCFS] rule and policy . . . and (b) include [identifying information] of the alleged perpetrator . . . ." *Id.* § 62A-4a-1003(4). The information in the MIS is accessible within DCFS "upon the approval of the executive director, on a need-to-know basis," *id.* § 62A-4a-1003(5), and may be accessible to a limited number of other individuals under certain circumstances, *see id.* § 62A-4a-1003(6) (noting that DCFS may allow "its contract providers, court clerks . . . , and the Office of the Guardian Ad Litem to have limited access to the [MIS]"); *id.* § 62A-4a-1006 (recognizing that the Licensing Information System, a subsection of the MIS, is accessible outside DCFS, but only for limited purposes and by specific organizations); *see also Devlin v. Smalley*, 4 F. Supp. 2d 1315, 1323 (D. Utah 1998) (mem.) ("A few provisions in the Utah Administrative Code require the Office of Licensing to use the [MIS] database to screen applicants for licensure, but the provisions do not mandate that the Office of Licensing take any particular action with respect to the application as a result. The point of the database, as the statute itself indicates, is to facilitate the sharing of information between departments within [the Department of Human Services].").

[6]Mother provides no evidence to substantiate her assertion that she is now listed in the MIS. For purposes of this appeal, we assume that her assertion is accurate.

[7]In fact, the record indicates that most of Mother's work experience has been in administrative settings, in the food service industry, and in mortgage lending. Notably absent from the record is any indication that Mother has ever held a position working with children.

consequence that prevents the conclusion that [Mother]'s claim is moot."[8] *See Moore*, 2009 UT App 128, ¶ 14; *see also Spencer*, 523 U.S. at 14. When a party has not shown the existence of "actual, adverse collateral consequences[,] . . . we will not presume that such collateral consequences exist." *Moore*, 2009 UT App 128, ¶ 17 (footnote omitted). Assuming, without deciding, that the collateral consequences doctrine applies in this civil context, we conclude that collateral consequences do not exist here, and therefore the exception does not preclude dismissal of Mother's appeal on mootness grounds.

II. Public Interest Exception to Mootness

¶10 In addition to the collateral consequences exception, we may review a technically moot claim if we determine that the public interest exception applies. *See In re C.D.*, 2010 UT 66, ¶ 13, 245 P.3d 724. Retention of a mooted case should occur "only under exceptional circumstances and where the public interest clearly appears." *McRae v. Jackson*, 526 P.2d 1190, 1191 (Utah 1974). "'The public interest exception to the mootness doctrine arises when the case [1] presents an issue that affects the public interest, [2] is likely to recur, and [3] because of the brief time that any one litigant is affected, is capable of evading review.'" *In re C.D.*, 2010 UT 66, ¶ 13 (alterations in original) (additional internal quotation marks omitted) (quoting *Ellis v. Swensen*, 2000 UT 101, ¶ 26, 16 P.3d 1233). The exception requires satisfaction of all three prongs, as evidenced by the use of the word "and" in the case law establishing the exception. *See id.* ¶¶ 13-15 (using "and" to link the three prongs of the public interest exception together and dismissing a mooted claim that satisfied the first two requirements of the exception but did not satisfy the third requirement).

¶11 Here, the primary issues are whether the protective order was supported by sufficient evidence and whether the hearing was conducted in a proper, constitutional, manner. Subsidiary to Mother's evidentiary challenge is her assertion that hearsay evidence was improperly admitted and relied on by the juvenile court. Regarding the sufficiency challenge, we do not believe the specific factual arguments challenging the basis upon which this particular protective order was granted "present[] an issue that affects the public interest," *see id.* ¶ 13 (internal quotation marks omitted). Indeed,

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[8]Additionally, the GAL asserts that since filing this appeal, Mother has voluntarily relinquished her parental rights in a district court proceeding. Although the record provided on appeal does not indicate whether Mother has actually voluntarily relinquished her parental rights, if she has, such a result further undermines Mother's collateral consequences argument.

"[t]he issues of which the courts frequently retain jurisdiction because of the public interest involved, although the immediate issues may have become moot, are class actions, questions of constitutional interpretation, issues as to the validity or construction of a statute, or the propriety of administrative rulings." *McRae*, 526 P.2d at 1191; *see also Ellis*, 2000 UT 101, ¶ 28 (determining that a mooted claim that does "not involve a class action, a question of constitutional interpretation, or an issue as to the validity or construction of a statute . . . does not present an issue that affects the public interest"). Mother's challenge to the factual basis of the protective order does not fall within any of those categories, and we are unconvinced that the issue otherwise presents an "exceptional circumstance[] . . . where the public interest clearly appears," *see McRae*, 526 P.2d at 1191. Accordingly, Mother's evidentiary claims fail to meet the public interest exception to mootness.[9] *Cf. Mortenson v. Turley*, 2009 UT App 67U, para. 5 n.3 (mem.) (noting that the public interest exception did not apply to a party's mooted appeal of the juvenile court's dismissal of a child protective order petition because the "factual determination" underlying the denial of the petition did not "fall[] within the exception to the mootness doctrine").

¶12 Similarly, we are not convinced that Mother's constitutional challenge satisfies the recurrence prong of the public interest exception. The Child Protective Order statute, *see generally* Utah Code Ann. §§ 78B-7-201 to -207 (2008 & Supp. 2011), and the Rules of Juvenile Procedure provide substantial guidance to the juvenile court regarding the manner in which child protective order proceedings ought to be conducted. Even if the juvenile court deviated from these procedures in the instant case, we are not convinced that the same issue "is likely to recur in a similar manner," *see Anderson v. Taylor*, 2006 UT 79, ¶ 10, 149 P.3d 352 (framing the recurrence prong of the public interest exception to involve the determination of whether a claim "is likely to recur in a *similar* manner" (emphasis added)). Accordingly, Mother's due process argument is also dismissed.[10]

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[9]To the extent the statutory framework and the Rules of Juvenile Procedure are unclear as to the general applicability of the Rules of Evidence in matters like this, such uncertainty is best resolved by the legislature or relevant rule-making authority. This opinion should not be construed as passing judgment on whether the juvenile court, under the facts and circumstances of this case, properly admitted and relied on hearsay evidence.

[10]Additionally, Mother admits that her due process challenge was not preserved, thus requiring us to overcome another layer of "exceptional circumstances" in order to

(continued...)

## CONCLUSION

¶13 Mother's challenges on appeal are moot. The collateral consequences exception and the public interest exception to the mootness doctrine do not apply. As a result, we dismiss the appeal.

James Z. Davis,
Presiding Judge

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¶14 WE CONCUR:

Carolyn B. McHugh,
Associate Presiding Judge

William A. Thorne Jr., Judge

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[10](...continued)
review the issue. *See State v. Irwin*, 924 P.2d 5, 7-8 (Utah Ct. App. 1996) (noting that the preservation rule "bar[s a party] from raising [an issue] for the first time on appeal" but that one exception to the preservation rule is the "concept of exceptional circumstances," which "is not so much a precise doctrine, which may be analyzed in terms of fixed elements, as it is a descriptive term used to memorialize an appellate court's judgment that even though an issue was not raised below and even though the plain error doctrine does not apply, unique procedural circumstances nonetheless permit consideration of the merits of the issue on appeal"). Thus, we do not address Mother's due process challenge, and this opinion should not be construed as containing any ruling as to whether the juvenile court acted properly by interjecting questions and interrupting the parties throughout the termination petition hearing.

**Rule 46. Disposition hearing.**

(a) Disposition hearings may be separate from the hearing at which the petition is proved or may follow immediately after that portion of the hearing at which the allegations of the petition are proved. Disposition hearings shall be conducted in an informal manner to facilitate the opportunity for all participants to be heard.

(b) The court may receive any information that is relevant to the disposition of the case including reliable hearsay and opinions. Counsel for the parties are entitled to examine under oath the person who prepared the pre-disposition report if such person is reasonably available. The parties are entitled to compulsory process for the appearance of any person, including character witnesses, to testify at the hearing. A minor's parent or guardian may address the court regarding the disposition of the case, and may address other issues with the permission of the court.

(c) After the disposition hearing, the court shall enter an appropriate order. After announcing its order, the court shall advise any party who is present and not represented by counsel of the right to appeal the court's decision.

(d) The disposition order made and entered by the court shall be reduced to writing and a copy mailed or furnished to the minor, and to the parent, guardian or custodian of a child, or counsel for the minor and parent, guardian or custodian, if any, the prosecuting attorney, the guardian ad litem, and any agency or person affected by the court's order. The disposition order may be prepared by counsel at the direction of the court, but shall be reviewed and modified as deemed appropriate by the court prior to the court's acceptance and signing of submission.

(e) Disposition of a petition alleging abuse, neglect, or dependency of a child shall be conducted also in accordance with Utah Code Section 78A-6-117, Section 78A-6-311, and Section78A-6-312.