NEW YORK COURT OF APPEALS ROUNDUP

RIGHT TO COUNSEL, SAME-SEX PARENTS, SUPPORT, EQUITABLE DISTRIBUTION

ROY L. REARDON AND MARY ELIZABETH MCGARRY*
SIMPSON THACHER & BARTLETT LLP

MAY 21, 2010

The Court of Appeals' majority and dissenting opinions in an action challenging various counties' systems for providing legal representation to criminal defendants capped a series of interesting and thoughtful opinions generated in response to a motion to dismiss. Separately, the Court generated six opinions in two cases arising out of a child born during a lesbian couple's relationship, one of which involved the rights and the other the responsibilities of the woman who was not the biological mother. In two other cases, one involving support obligations (decided unanimously) and another discovery into marital fault for equitable distribution purposes (resolved 6-1), biological mothers had deceived men as to the paternity of a child.

Right to Counsel

Hurrell-Harring v. State of New York, yet another significant decision by the Court, raised the question of whether a purported class action complaint filed by 20 indigent defendants in criminal cases brought in five counties, which alleged systemic deficiencies in the manner in which legal services were provided, stated a justiciable cause of action.

Plaintiffs claimed that the five counties' provision of legal services to indigents failed to comply with the state's obligations imposed under *Gideon v. Wainwright*, 372 U.S. 335 (1963). The system put in place by the legislature after *Gideon* made each county individually fulfill the obligation to provide counsel and fund its program, for the most part, by itself. The complaint alleged that this arrangement was costly, largely underfunded and politically unpopular. Moreover, it alleged, in operation this system denied plaintiffs and others similarly situated their constitutional and statutorily guaranteed rights.

---

* **Roy L. Reardon** *and* **Mary Elizabeth McGarry** *are partners at Simpson Thacher & Bartlett LLP.*

For relief, plaintiffs sought a declaration that their rights and the rights of the class members were being violated, and an injunction to prevent further denial. Plaintiffs sought no relief in the pending criminal cases in which they were defendants, however.

The Supreme Court denied the state's motion to dismiss, but the Appellate Division, Third Department, reversed (3-2). The Appellate Division dismissed the complaint, concluding that the alleged deprivation of the right to effective assistance of counsel could not be vindicated in a collateral civil proceeding, but instead could only be addressed in a motion for post-conviction relief, and that the action essentially sought a reallocation of state resources that was a legislative prerogative.

The Court, in an opinion by Chief Judge Jonathan Lippman for the 4-3 majority, reversed and reinstated the complaint. Judge Eugene F. Pigott Jr. filed a dissenting opinion joined in by Judges Susan Phillips Read and Robert S. Smith. In all, 13 judges passed on the motion to dismiss. Seven voted to sustain the complaint and six favored dismissal. After reviewing the various opinions at all levels, one can reaffirm that the courts of New York are alive and well.

The majority rejected the position that the complaint only contained performance-based claims for ineffective assistance of counsel. It distinguished between a claim that representation provided was ineffective, which should be resolved as part of a criminal case, and the claim found in the case before the Court of "constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon*." The complaint's allegations constituted a claim that plaintiffs were not receiving representation at all, let alone effective representation, which claim was properly asserted in a civil action.

The Court specifically cited to the allegations that the criminal defendants had no counsel present at arraignment, while entering a plea, when bail was fixed, when jailed because bail was not forthcoming, or in other situations in which "critically important legal transactions take place." The Court also cited to the allegations that appointed lawyers were unavailable to their clients for guidance and consultations "sometimes for months on end," did little more than act as "conduits for plea offers, some of which purportedly were highly unfavorable," and missed and or were unprepared for court appearances. The Court concluded that these allegations supported the claim that the state was violating the directive of *Gideon* that a defendant have "the guiding hand of counsel at every step in the proceedings against him."

In the Supreme Court, plaintiffs had sought by way of a motion for a preliminary injunction various forms of relief directing the state to remedy the deficiencies in the defense of indigent defendants. While this motion was never reached, it does provide a picture of how plaintiffs seek to remedy the alleged systemic deficiencies, including: fixing standards to ensure that appointed counsel are qualified; imposing limits on the workload and caseload of appointed counsel; guaranteeing that every eligible defendant have counsel within 24 hours of arrest; requiring at every critical stage of the case the presence of a lawyer who confers with the client in advance to allow for preparedness; providing experts and investigators where defense

counsel deems such services useful to the defense; and establishing written standards of eligibility for the assignment of counsel.

These forms of relief sought left no doubt that at the core of the issue before the Court was whether at this most preliminary stage of the case—a motion to dismiss under CPLR 3211—the command of *Gideon* should govern, or whether the well-recognized principle that the legislature's judgment as to the allocation of state resources is dispositive, should instead control.

The case will now return to the trial court, perhaps for a hearing on the motion for a preliminary injunction, or for a trial in which plaintiffs will face the burden of presenting proof that what they have alleged as grave shortcomings in the delivery of legal services to the indigent in criminal cases is in fact a systemic shortcoming that can only be addressed in a global way. Hopefully, the parties can resolve the matter and avoid the delay and expense of further legal proceedings by reaching an accommodation that gives indigent defendants in criminal cases in all counties an assurance that a system and procedures are in place to provide reasonable and effective representation at every step of a criminal proceeding.

Who Is a "Parent"?

When is the same-sex partner of a biological mother a "parent" of the biological mother's child, what court may decide that question, and under what criteria will the decision be made, were discussed in the several opinions issued to two recent decisions.

The support action of *Matter of H.M. v. E.T.* was filed by a resident of Canada under New York's law implementing the Uniform Interstate Family Support Act. The respondent was her former same-sex partner. The couple decided to have and raise a child together and resided together when the child was conceived by artificial insemination and born. The respondent, however, did not adopt the child. After the parties' relationship ended and the biological mother moved to Canada with the child, she sought child support from her former partner.

Article 4 of the Family Court Act provides that the "parents" of a child under 21 may be required to pay child support. Respondent argued that she was not the child's parent and thus the family court was without jurisdiction to adjudicate the matter.

The Court, in an opinion by Judge Carmen Beauchamp Ciparick, held that the family court has ancillary jurisdiction where necessary to carry out its core function of presiding over support proceedings, including jurisdiction to decide whether a party before it is a "parent." It remitted the case to the Appellate Division without resolving whether respondent was, or could possibly be, the child's parent.

Judge Theodore T. Jones authored a dissent that was joined in by Judges Victoria A. Graffeo and Susan Phillips Read. It argued that a Family Court is empowered to resolve the issue of

parentage under Article 5 only, which is on its face limited to paternity. And because the Family Court could not find that the respondent was the child's parent, the dissent reasoned, it could not adjudicate a support petition against her. Judge Jones asserted that the majority's ruling was inconsistent with the plurality opinion handed down that day in another case, *Debra H. v. Janice R.* There, the Court reaffirmed its decision in *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), which drew a bright-line rule that only a child's biological or adoptive parent has standing to seek visitation against the wishes of a fit parent.

Comity for Parent Status

Debra H. also involved a child conceived by artificial insemination and born during the relationship of a lesbian couple that decided to have and raise a child together. The twist, which proved dispositive to the outcome, was that between conception and birth the couple travelled to Vermont and entered into a civil union there. After Janice, the biological mother, gave birth, she repeatedly rebuffed the request of her partner, Debra, to become the child's second parent by adoption. The couple later separated, and for the first two years thereafter, Janice permitted Debra to see and communicate with the boy, but Janice scaled back this access over time and eventually denied access altogether. Debra commenced an action for joint legal and physical custody of the child.

Four judges were of the view that *Alison D.* should remain the law of New York, which view was expressed in an opinion by Judge Read (Judges Graffeo, Jones and Pigott joining). As noted above, under *Alison D.*, Debra was a stranger to the child for purposes of New York law, and the boy's biological mother was within her rights to deny petitioner access to the child. Judge Graffeo also wrote a concurring opinion, in which Judge Jones joined, to emphasize her view that *Alison D.* should remain good law unless and until the legislature define "parent" to include persons in the position of petitioner.

Judge Read's opinion also set forth the rationale for nevertheless permitting petitioner to pursue custody, which was supported by a majority of the Court. Under the law of Vermont, by entering into a civil union with respondent prior to the birth, petitioner became a parent of the child. The Court determined that, as a matter of comity, that mother-son relationship should be recognized in New York because it did not offend the public policy of New York to do so. Judge Read noted that a fundamental underpinning of*Alison D.* was the need to provide certainty as to parentage, which the Vermont statute does.

Judge Ciparick advocated overruling *Alison D.* as out of step with the social changes that have taken place in the 19 years since it was decided and leading lower courts to either sever strong family bonds or engage in "deft legal maneuvering" to avoid that harsh result. Judge Ciparick's opinion, in which Judge Lippman joined, observed that Section 70 of the Domestic Relations Law, which governs custody and visitation, does not define "parent." This opinion advocated determining parentage under a flexible, multi-factored test that takes into account the best interest of the child.

Finally, Judge Smith authored an opinion addressing both *Matter of H. M.* and *Debra H.*, joining the majority decision in the former case in full, but concurring only in the result in the latter case. Judge Smith stated that "it seems intuitive that—[gay and straight] people should be treated the same way."[1] Like the plurality, he believes it important to have a bright-line rule for determining parentage rather than a flexible approach as advocated in Judge Ciparick's opinion. However, in Judge Smith's view the bright-line rule of *Alison D.* produces the "unacceptable" result of denying parental rights to a person in petitioner's position. He would apply to lesbian relationships[2] the common law presumption that a child conceived through artificial insemination by one member of a couple living together is also the child of the other member of that couple.

Discovery on Marital Conduct

How bad must a spouse's conduct be to have an impact on the distribution of marital property? In *Howard S. v. Lillian S.*, the Court reiterated that only in truly exceptional situations of "outrageous or conscience-shocking conduct" should a spouse's behavior be a factor in making an equitable distribution. Indeed, the Court held that, even to obtain discovery into the matter, the adverse party's alleged misconduct must be egregious, that which is defined very narrowly.

Three children were born during the course of the parties' marriage. Unbeknownst to the husband, the third child was the product of an extramarital affair. Three years after that child was born, the wife began another affair. The husband confronted his wife with his suspicions, but she denied her infidelity and maintained that there were no grounds for divorce. The parties (at the suggestion of the wife) then entered into a collaborative law process in an effort to amicably reach a divorce settlement agreement.[3] Subsequently, the husband learned through a DNA marker test that he was not the father of the youngest child.

The husband then sued his wife for divorce on the grounds of cruel and inhuman treatment and adultery, and argued that the bulk of the marital property should be awarded to him due to the defendant's conduct constituting fault, i.e., grounds for divorce.[4] A dispute arose over whether the plaintiff husband should be permitted liberal discovery into the defendant's marital fault.

The Domestic Relations Law identifies numerous factors that a court may consider in determining what distribution of marital property is "equitable," including "any other factor which the court shall expressly find to be just and proper." Dom. Rel. L. § 236(B)(5)(d)(14). In *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985), the Court established that marital fault is not properly considered except in "egregious cases which shock the conscience of the court." In *Howard S.*, the Court endorsed the conclusion reached by lower courts following *O'Brien* that adultery is not in itself a proper factor to be considered in property distribution.

Judge Lippman's opinion for the Court in *Howard S.* did not attempt to identify specifically what situations are so exceptional that they would satisfy the outrageous/shocks-the-conscience standard. It did, however, refer to appellate division decisions in which the standard

was met by attempted bribery of the trial judge or vicious assault of a spouse in front of the children. The Court further stated that extreme violence is not a necessary component of egregious conduct.

With respect to the issue directly on appeal of whether the plaintiff should have been permitted to conduct discovery, the majority ruled that despite New York's general policy in favor of liberal discovery, in the domestic relations context liberal discovery on the issue of marital fault should be permitted only in rare circumstances. That holding is consistent with the approach the First and Second Departments have taken, as opposed to the approach of the Third and Fourth Departments that have permitted liberal discovery into such matters.

The majority opinion set forth the policy reasons behind the high bars the Court has set. As to equitable distribution, the Court explained that adultery does not alter the nature of a marriage as an economic partnership. Moreover, adjudication of fault would consume courts' time on collateral issues. As to discovery into fault, the Court observed that it would create the potential for abuse and harassment, and possibly pressure parties to settle rather than litigate cases raising very personal issues.

Judge Pigott dissented, believing it was premature to conclude that, as a matter of law, the defendant's behavior did not constitute egregious misconduct for the purpose of equitable distribution. The dissent also expressed the view that liberal discovery likely would lead to fewer trials and more harmonious settlements.

Endnotes:

1. Judge Smith wrote the plurality opinion in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), which held it constitutionally permissible to deny marriage and civil unions to same-sex couples.

2. Judge Smith would leave for another day what rule should govern male same-sex couples on the basis that it is impossible for two men to become biological parents of the same child and thus the common law presumption of parentage would not apply.

3. The collaborative process involves specially trained lawyers, family professionals and neutral experts who attempt to resolve divorces outside of the litigation process, using a cooperative negotiation model that takes into account the best interests of all family members.

4. The husband also asserted a cause of action for fraud on the basis that the wife's misrepresentations that she had been faithful caused him to remain in the marriage to his financial detriment. Because the defendant did not cross-appeal the denial of her motion to dismiss the fraud claim, that issue was not before the Court.