

FAMILY AND INSURANCE LAW AND THE STALKING STATUTE

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The Court of Appeals resolved two important family law issues in *Matter of Marino S., Jr.*, holding that New York's implementation of the Adoption and Safe Families Act may be applied retroactively, and recognizing the concept of derivative abuse. In *People v. Stuart*, the Court upheld New York's stalking statute against challenges to its constitutionality both on its face and as applied. Finally, the Court narrowly construed the pollution exclusion in the insurance matter of *Belt Painting v. TIG Ins. Co.*

Family Law

The horrible facts of *Matter of Marino S., Jr.*, need be reviewed only briefly. Marino S. raped his eight-year old stepdaughter and she lay in the same bed as Marino's sleeping four-year old daughter, while Marino's son slept in another room with the children's mother, Marino S.'s common law wife. The girl began to bleed profusely, but Respondents waited two hours before seeking medical help for the child, during which time they concocted a cover-up story and during which time the girl almost died. The children were placed in foster care together, and proceedings to terminate parental rights were commenced in Family Court.

The first issue to be resolved arose out of the foster care agency's failure to make diligent efforts to reunite the parents with the children. During termination proceedings, in 1999, New York passed its version of the Federal Adoption and Safe Families Act ("ASFA"), which amended both the Social Services Law and the Family Court Act to, *inter alia*, make it easier to terminate the rights of severely abusive parents. Now a finding of "severe abuse" under the amended Social Services Law, like a finding of "aggravated circumstances" under the amended Family Court Act, has the effect is dispensing with the requirement that diligent efforts be made to reunite parents and children.

The Family Court made a finding of severe abuse, concluded that reunification efforts were not necessary, and terminated the Respondents' parental rights. Respondents argued that the ASFA could not be applied retroactively, and that therefore diligent reunification efforts were required. The Court of Appeals, in a unanimous opinion by Chief Judge Judith S. Kaye, affirmed the termination of rights, finding the ASFA could be applied retroactively.

The Court noted that “nonprocedural statutes ‘are not to be applied retroactively absent a plainly manifested legislative intent to that effect.’ . . . Ameliorative or remedial legislation, however, should be given retroactive effect in order to effectuate its beneficial purpose.” (Citations omitted.) The Court determined that the statute was remedial in nature and did not impair vested rights because ASFA merely expedited an existing system for determining whether parental rights should be terminated. Further, the ASFA makes clear the legislative intent that the health and safety of children is of paramount importance. In fact, in this case the Family Court had made a finding that efforts to reunite the family would have been detrimental to the best interests of the children, a finding that under even pre-ASFA law would have excused an agency seeking to terminate parental rights from showing that it had made diligent efforts at reunification.

Of perhaps broader applicability is the Court of Appeal’s holding that a finding of severe abuse of one child may be predicated upon abuse of another child in the family, or derivative abuse, although New York’s statutes do not make any explicit provision therefor. The Court noted that lower courts have consistently sustained findings of derivative abuse “where a respondent’s abuse of the subject child is so closely connected with the care of another child as to indicate that the second child is equally at risk.” It observed that merely witnessing the abuse of a sibling may be damaging to a child. And the Court affirmed the Family Court’s decision finding of derivative abuse based upon the understanding that a parent whose judgment and impulse control are so poor as to harm one child is “likely” to harm other children in his or her care.

Stalking Statute

In *People v. Stuart*, the Court was faced with a challenge to New York’s stalking statute, Penal Law § 120.45, as being unconstitutionally vague both on its face and as applied. The Court sustained the statute on both grounds in an opinion for the Court by Judge Albert M. Rosenblatt. Chief Judge Judith S. Kaye wrote a separate opinion, concurring only in the result, which was joined in by Judge Carmen Beauchamp Ciparick. Both opinions elevate the analysis of a complex and recurring constitutional issue to its highest level.

Before trial, Stuart moved to dismiss the Class B misdemeanor charge of stalking in the fourth degree on the grounds that the statute was unconstitutional on its face (within the four corners of the statute) and as applied to him in that it failed to provide adequate notice of the conduct that it prohibited and failed to give sufficient guidance to those charged with the responsibility to enforce it. The trial court rejected Stuart’s argument and found that, as applied to him, the statute satisfied the requirements of due process. Stuart then waived a jury, was tried before the court and was convicted of two counts of fourth degree stalking. The judgment of conviction was affirmed by the Appellate Term and Stuart thereafter was granted leave to appeal to the Court of Appeals.

Stuart's claim as to "vagueness" was based principally upon the words "no legitimate purpose," which he argued the ordinary person would not understand and would result in arbitrary law enforcement. He also claimed that the absence of a specific intent requirement in the statute increased the "vagueness problem." While he acknowledged that the statute contained a requirement of intent, Stuart argued it failed because there was no requirement of specific intent to cause fear or harm. The Court disagreed on both counts: Stuart could not reasonably have failed to realize that his intentional conduct against the complainant for over a month was unlawful under the stalking statute and that the statute focused on what the offenders do, "not what they mean by it or what they intend as their ultimate goal." Also, the "no legitimate purpose" language, as commonly understood and when read as part of the entire statute, provided Stuart with sufficient notice that his conduct with respect to the complainant, which the Court elaborately detailed, was unlawful, particularly after Stuart had been told that the complainant wanted no contact with him.

The Court also took note that Stuart never offered any explanation for his conduct or sought to show that it had a legitimate purpose. In addition, Stuart did not argue that the complainant was "never in fear, reasonably or otherwise, or that she suffered no harm, whether it be material or not."

The Conflict in the Court

The Court's opinion therefore concluded that, as applied to Stuart's conduct, Penal Law § 120.45 (1) and (2) was not unconstitutionally vague. Had Judge Rosenblatt's opinion ended there it would appear there would have been no opinion by Chief Judge Kaye. But Judge Rosenblatt's opinion went further and concluded that because Stuart's conduct represented "one constitutional application of the statute," the statute therefore was constitutional on its face. It was the later conclusion with which the Chief Judge Kaye disagreed and saw as announcing a rule that whenever an "as applied" challenge fails (as did Stuart's) that the statute *must* be found to be constitutional on its face.ⁱ

The different opinions seem to stem from Judge Rosenblatt's view that if the statute challenged as applied is constitutionally valid as to "at least one person" then it is necessarily valid on its face, and the position of the Chief Judge, relying in part upon the Court's earlier opinion in *People v. Bright*, 71 N.Y.2d 376 (1988), that an as-applied challenge can be rejected because of the particular circumstances of a defendant's conduct and yet the statute can nevertheless be held to be unconstitutional on its face.

Pollution Exclusion

In *Belt Painting Corp. v. TIG Ins. Co.*, the Court once again addressed whether a claim unambiguously came within an insurance policy's pollution exclusion such that the insurer did not have to defend and indemnify. Once again, the Court ruled in favor of the insured.

The underlying claim was one for personal injury, brought by an office worker against subcontractor Belt Painting, alleging that he was injured by solvent and paint fumes released while Belt Painting was working on his office building. Belt Painting submitted the claim to its insurance company, which denied coverage on the basis that the worker's claim fell within the policy's pollution exclusion.ⁱⁱ The insured commenced a declaratory judgment action and prevailed on its summary judgment motion in the Appellate Division, Second Department.

Chief Judge Judith S. Kaye's opinion for the unanimous Court first set forth some general principles of insurance law that presaged the outcome. Among these were that an insurer has a duty to defend if there is a "reasonable possibility" of recovery under the policy, that insurance policies must be read in light of "common speech" and the "reasonable expectations of a business person," and that exclusions in particular must be stated in "clear and unmistakable language . . . subject to no other reasonable interpretation" because they will be given narrow construction with ambiguity construed against the insurer.

The opinion also recounted the history of pollution exclusions and provided a thorough discussion of their iterations over the years and various courts' interpretations of those iterations, including two decisions by the Court of Appeals in *Westview Assocs. v. Guaranty Nat'l Ins. Co.*, 95 N.Y.2d 334 (2000), and *Continental Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y.2d 640 (1993). In general, New York cases have found ambiguity in the various forms of the exclusion and declined to apply them broadly.

One of the insurer's arguments for excluding the claim was that the term "pollutant" was specifically defined in the policy to include "fumes." The Court, however, reasoned that such an interpretation would render any irritant a "pollutant" and thus "infinitely enlarge the scope of the term," contradicting common speech and reasonable expectations of what substances are within a pollution exclusion. Even if "pollutant" included fumes such as those at issue, the exclusion would not apply because it was limited to the "discharge, dispersal, seepage, migration, release or escape" of pollutants, which could not be said to include "ordinary paint or solvent fumes that drifted a short distance from the area of the insured's intended use." Certainly such "terms of art" in environmental law were not intended to cover indoor exposure to the insured's "tools of its trade," the Court reasoned.

The insurer's other argument was based upon the fact it had dropped a phrase found in earlier versions of the pollution exclusion that had limited it to releases of pollutants "into or upon land, the atmosphere or any water course or body of water." The Court declared such phrase had been redundant because any release would have to be into land, atmosphere or water, so the clause's removal was of no effect.

In sum, because the Court found that “reasonable minds” could disagree as to whether the pollution exclusion applied in this particular case, the policy was ambiguous as applied and thus required the insurer to provide defense and indemnity. The clear message of the *Belt Painting* decision is that, unless an underlying claim falls squarely within “classic environmental pollution,” it will be very difficult for an insurer to deny coverage.

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- ⁱ Chief Judge Kaye’s opinion joined in the rejection by the Court of Stuart’s as-applied vagueness challenge and also agreed as to the Court’s rejection of the facial challenge. However, as to the facial challenge, Chief Judge Kaye did so because she concluded that the statute provided persons of ordinary intelligence with fair notice of what is proscribed and did not permit discriminatory enforcement by the police.
- ⁱⁱ The policy’s “Total Pollution Exclusion Endorsement” excluded coverage for “‘Bodily injury’ or ‘property damage’ which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.”